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IN THE
SUPREME COURT OF THE UNITED STATES
1996 TERM

WAYNE A. LUNDQUIST, JR., PETITIONER

-VS-

PREMIER FINANCIAL SERVICES - TEXAS, L.P.,
RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Shelby A. Jordan
JORDAN, HYDEN, WOMBLE AND CULBRETH, P.C.
900 NationsBank Center North
Corpus Christi, Texas 78471
Telephone No. (512) 884-5678
Telecopier No. (512) 888-5555

ATTORNEY IN CHARGE FOR PETITIONER

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42 pp

QUESTION PRESENTED

Whether Petitioner was denied due process of law as a result of:

(a) the District Court granting leave to amend pleadings such that a "live" pleading existed by which defense of a motion for summary judgment could be supported; and

(b) thereafter, incorrectly striking the entire pleading, including the authorized and allegedly, unauthorized amended pleadings of the affirmative defenses of waiver and equitable estoppel, as a result of the Honorable District Court's mistake that the Honorable District Court had not authorized the pleading of "waiver"; and

(c) thereafter, entering a summary judgment as a result of the "*death penalties* " order striking the pleadings which otherwise (that is, with the Amended Pleadings) was not appropriate as a matter of law.

Whether the District Court erred in granting summary judgment against Lundquist's where the record is replete with summary judgment evidence illustrating material fact issues.

PARTIES TO THIS PROCEEDING

The Petitioner respectfully certifies that the persons or entities listed below have, or may have an interest in the outcome of this litigation:

a. Wayne A. Lundquist, Jr.

b. Premier Financial Services - Texas LLP

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PETITION FOR A WRIT OF CERTIORARI

TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT

Petitioner, Wayne A. Lundquist, Jr., (herein "Lundquist") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit refusing to hold that Lundquist was denied due process of law by the trial court's rulings that Amended Pleadings would be stricken, (the "death penalty" equivalent in civil

cases) and summary judgment entered in absence of the Amended Pleading.

OPINIONS BELOW

The opinion of the Court of Appeals was ordered not published but appears in the Appendix at page A-1. The Order denying the Petition for Rehearing appears in the Appendix at page A-4.

The unpublished written opinions and orders of the District Court for the Southern District of Texas appears in the Appendix, pages A-5, through A-53.

STATEMENT OF JURISDICTION

The Court of Appeals Opinion in this matter was filed on November 6, 1996, and the denial of Lundquist's Motion for Rehearing was filed on December 5, 1996. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

It was not a summary judgment upon "live" pleadings that resulted in this Petition. It is the denial of due process of law by the Honorable District Court refusal to permit Lundquist to respond to Premier's amended complaint after a ruling that such responsive pleading could be

made, and a mistaken belief that the Lundquist was wrong in the authorized amendment filed, that resulted in "death penalty" orders against Lundquist and the summary judgment.

This suit, brought in 1993 by Premier Financial Services - Texas, L.P. ("Premier") on a guaranty agreement ("Guaranty") signed by Lundquist in 1983. Lundquist alleges that he is not liable on the Guaranty under the express language of the Guaranty and raised a number of other defenses. The District Court, in a series of contradictory orders, struck all of Lundquist's attempts at amending his pleadings in compliance with the District Court's permission to do so. The Honorable District Court expressly authorized Lundquist to raise "four (4) affirmative defenses" and one counterclaim. The Honorable District Court then made a decision that Lundquist

(a) added "waiver" as a defense which was not authorized by the Honorable District Court; and

(b) did not properly "articulate" the defenses authorized

The District Court *struck all amended pleadings*, both the alleged amended pleadings raising objectionable defenses, notwithstanding the fact

that the Honorable District Court was mistaken (the defense of "waiver" had in fact been authorized) and absolutely no prejudice to Premier was shown either when these amendments were authorized, or when they were stricken. With no defensive pleadings on file, the Honorable District Court granted summary judgment on the Guaranty claim against Lundquist on December 6, 1995.[1] Fifth Circuit Court of Appeals affirmed the judgment of the District Court without reference to the death penalty orders, or expressing any findings regarding the uncontroverted defenses, including laches and equitable estoppel. (See Appendix. page A-1).

The events leading up to the "death penalty order" removing all pleadings responding to the live complaint of Premier, are as follows. On May 5, 1995, Premier an **unopposed** motion to amend (not supplement) *for the second time* its complaint to add a party.[2] Accordingly, in due

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1 The District Court based the Summary Judgment, in whole or in part, upon refusal to "accept" (as contrasted to permit - which the District Court had already authorized) Lundquist's attempts at amended pleadings regarding certain defenses which had previously been authorized by the District Court.

2 At the time of Premier's Second Amendments were allowed by the Court, Lundquist in good faith believed that he would have a right to file an answer to the amended pleading

order, the Court granted Premier's unopposed Motion to Amend its pleading on June 14, 1995, and on the same day the Court granted Lundquist's previously filed Motion to amend its answer to Premier's previous **First Amended Complaint** *by order which made no reference to the First Amended Answer as being deemed to apply to the "Second Amended Complaint".*[3] At this time, Lundquist's First Amended Answer was applicable only to the First Amended Complaint, having been prepared and filed long before the Second Amended Complaint was filed. ***No pleading has ever been permitted to be filed in this case in response to the Second Amended Complaint*** and a Summary Judgment was

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and believed that Premier would likewise consent, and even if not, Lundquist believed, in good faith, that: (a) he was entitled to file a responsive pleading to an amended complaint, as a matter of right; and (b) that he could have been the subject of a default judgment similar to that which had been filed against the co-defendant if he did not file an answer; and (c) that because Premier's Second Amended Complaint was permitted (and an answer must be filed) there was no necessity to seek an extension of the pre-trial deadline for amendment of pleadings in due course; and, finally, (d) because the Motion For Summary Judgment filed was based on the Second Amended Complaint, a pleading which without a responsive pleading could be taken as true.

3 Later the Court indicated that it was the intention of the order to require the First Amended Answer to apply to the later filed Second Amended Complaint. This was unknown by Lundquist's counsel until the November 2, 1995 conference with the Court.

entered on the Second Amended Complaint ***with no responsive pleading*** which would otherwise support the uncontroverted summary judgment defensive evidence of Lundquist.

In response to the filing and subsequent service of a copy of the ***Second*** Amended Complaint Lundquist filed his Second Amended Answer and Amended Counterclaim. Premier filed a Motion to Strike the Second Amended Answer of Lundquist (filed in response to the Second Amended Complaint).[4] On November 2, 1995, a hearing was held by telephonic conference on Premier's Motion To Strike the Second Amended Answer. Lundquist set forth his reasons regarding the right to file the amended answer, including the fact that no discovery (other than written interrogatories which are subject to supplement up to 30 days prior to trial) had been undertaken, in support of his request to allow the amendment. ***The Court granted leave to file an amended answer*** as follows:

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4 Accordingly, the first party or witness depositions were commenced in this case on November 10, 1995, by agreement of the parties, long after the Second Amended Answer was filed. On that date, Premier and Lundquist exchanged for the first time documents in this case.

"THE COURT: I want you to tell me for the record what your defenses are, what your affirmative counterclaims are.

. . . .

MR. JORDAN: ***Okay*** . . .

THE COURT: You started with ***promissory estoppel.***

MR. JORDAN: And ***waiver***, and ***laches***.

THE COURT: ***Okay, and that's it?***

MR. JORDAN Well, that's my affirmative defenses.

. . . .

MR. JORDAN: Insofar as affirmative recovery and to the extent that these would be ***recoupment or offset defenses***, then ***the guaranty agreement itself***.

. . . .

"MR. JORDAN: I'm not articulating myself. ***If the guaranty is not enforceable on its own terms, . . . I don't want to waive that defense . . .***"

THE COURT: ***Okay.***

MR. JORDAN: It if is, then that's the only thing I'd add is that I would like to be able to also put in there that the guaranty by its own terms only guarantees a note which has now been ***satisfied*** by ***renewal***.

THE COURT: ***Okay.***

. . . .

THE COURT: *Put in those things in there.*

MR. JORDAN: *All right.*

> THE COURT: I will grant that amendment so we can start over on a summary judgment."

The authorized amended pleadings would have ***four defenses and one counterclaim*** which included (i) promissory estoppel, (ii) laches, (iii) waiver, and (iv) the defense to the guaranty contract itself articulated two ways during the hearing (both being "Okay" with the Honorable District Court): 1. ". . . the guaranty is not enforceable on its own terms", (or put another way) 2. ". . . the guaranty by its own terms only guarantees a note which has now been satisfied by renewal."

There was absolutely no ***requirement*** by the Honorable District Court's that a pleading showing "good cause" must be filed in order to comply with the Court' directive "to file a supplemental amended answer,"[5] -- only that ". . . the Court allowed Lundquist to file a supplemental amended answer . . . ."***Id***. On November 20, 1995 (actually entered November 27, 1995, and *not received by Lundquist's* counsel until November 29, 1995) the Court

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5 One of the Court's later basis for striking the pleadings was an alleged failure to set out "good cause" to permit the amendment.

entered an inconsistent written order concerning the November 2 hearing:

> "At this hearing, ***the Court allowed (Lundquist) to file a supplemental amended answer on November 3, 1995***, limiting his affirmative defenses to the following: (1) promissory estoppel; (2) laches; (3) usury; and (4) ***that the guaranty is not enforceable by its own terms***." (Emphasis added.)

Of course, this is not what the hearing transcript revealed because "***waiver***" and "***satisfaction" by "renewal***" were expressly permitted by the trial judge (and without a requirement or caution to include "good cause" grounds to be considered in allowance of the amendment); however, this erroneous order of the Honorable District Judge began the series of problems between the District Court and Lundquist resulting in a "death penalty" order striking his pleading and a subsequent summary judgment against Lundquist on Premier's pleading which had no live pleading in response.

Although the Amended Answer authorized by the District Court raised the defense of ***"waiver" and "satisfaction" by "renewal"*** which had been expressly permitted in the November 2 hearings. Premier again filed another

Motion To Strike this pleading. Lundquist filed his response, stating that Lundquist ***only intended*** to plead the authorized "four defenses and one counterclaim" (because of the Court' previous order authorizing same) as follows:

> "(a) satisfaction by performance of the Guaranty (Admitted as appropriate by Premier that "the guaranty at issue applies only to the original note"); and
> (b) Waiver; and (authorized by the Court)
> (c) Equitable Estoppel (including equitable and promissory estoppel) (admitted by Premier as authorized by the Court); and
> (d) Laches (admitted by Premier as authorized by the Court), and
> (e) setoff and recoupment (which is a defense as a matter of law - no a new defense when a counterclaim is pending; and
> (f) an affirmative counterclaim for usury (admitted by Premier as authorized by the Court)."

Lundquist did not know until he received on November 27 the November 20 Court order[6] that the Honorable District Court believed it did not

6 It was when Lundquist received a copy of the written order that Defendant noticed that "waiver" was not included in the Court's ruling, although the Court in fact expressly authorized the defense at the hearing concerning the amended pleadings.

grant permission to raise the defenses listed in ¶ 1 of his Third Amended Answer, specifically "waiver". On November 2, 1995, a hearing was held on Premier's Stricken Motion to Strike.[7] The Court decided that the pleading of ***"waiver," was improper,***[8] and again stuck Lundquist's ***entire amended pleading***. *See*, Appendix, page A-33. At this time, the Court criticized Lundquist's Second/Third Amended Answer that the following "facts" were attempts to raise unauthorized defenses (*which the Lundquist pleading itself says is not the case*):

(a) Setoff and Recoupment (dealing only with the authorized counterclaim -- this is simply applying the law of setoff when both parties sue each other;[9] and

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7 The November 20 hearing was held at which Premier told the Honorable District Court that Premier's counsel had a conference with the clerk of the District Court and that, unknown to Lundquist, a hearing was to be held on Premier's Motion To Strike (which had been previously stricken by order of the District Court). The District Court agreed to hear the Motion at that time even without a live pleading and although the Court may not have had a copy of the response filed by Lundquist at the time. The response of Lundquist to the continuing stream of Motions To Strike was filed only November 20, 1995, and may not have been available to the Court.

8 And that any reference to "foreclosure", "fraud accident or mistake", were improper.

9 This was discussed, and is applied as a matter of law when a counterclaim is found to exist. The request for set-off

(b) Waiver; *(which was expressly authorized by the oral pronouncement of the Honorable District Court, but not by the written version of the Court's pronouncement); and*

(c) together with two other "fact" pleadings).[10]

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applied, by the specific language of the proposed pleading, only to the authorized counter-claim:

> "37. Lundquist is entitled to set off or alternative to recoup, all damages suffered by him from any claim for liability he may owe to Plaintiff, as a result of the violation of the usury law as set forth in his Counterclaim. This setoff may take the form of proof of damages as an affirmative defense or as a result of the Counterclaims filed by Lundquist against Premier."

Because the counterclaim filed by Lundquist is authorized by this Court, certainly a pleading which set forth the required application at law for treatment of offsetting damages could not be found inappropriate.

10 "Wrongful foreclosure . . . ." (which was *not* plead as a separate affirmative recovery or defense, *but as an element of damages in support of the authorized defenses of equitable (promissory) estoppel* and his denial of lawful offsets and credits pleading by Premier (The reference to wrongful foreclosure is an element of the allegation of Laches, and the injury to Lundquist (which must be plead as an element of Laches) as a result of the delays of Plaintiff in filing suit or bringing the claims against Lundquist); and

Fraud, accident, or mistake; (which was *not* plead as a separate affirmative recovery or defense, but only as an ***element of fact in support of the authorized defense of equitable estoppel, showing that Lundquist's actions (or inaction) were reasonably induced under the circumstances*** -- which could have been the result of Premier's successor's fraud, accident or mistake). As an element of equitable estoppel. An element of equitable estoppel includes when a party conceals or makes a false (not necessarily knowing) representation of

These defenses were absolutely necessary and appropriate to defend against the Premier Summary Judgment, and were completely supported by the summary judgment affidavit and documentary evidence offered in opposition to the summary judgment.

As a result of this second telephone hearing, after striking the attempted Second Amended Complaint, Lundquist was ***again authorized to file amended pleadings*** (believing he had somehow lost "waiver" as a defense in the interim). This second order following the hearing of November 20th reads as follows:

> "Defendant is given until November 27, 1995, to attempt to file answer properly setting our ***four defenses***[1] [1] ***and***

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material facts. ***Scott v. Vandor,*** 671 S.W.2d 79, 87 Tex. App—Houston [1st Dist.] 1984, ref. n.r.e.) *This element must be plead.* Promissory estoppel and quasi estoppel, also allow the defense of estoppel in absence of a "knowing" misrepresentation of a material fact. ***Fretz Const. Co. v. Southern Nat. Bank, Etc.***, 626 S.W.2d 478, 480 (Tex. 1981); ***Adams v. Petrade Intern., Inc.***, 754 S.W.2d 696,707 (Tex. App.—Houston [1st Dist.] 1988, den

[1] The written order signed the same day (reciting in writing the "previously delineated" four defenses allowed: (1) promissory estoppel; (2) laches; (3) usury (not a defense, but a counterclaim); (4) and that the guaranty is not enforceable by its own terms. Thus, the Court only recites three defenses and a counterclaim, again leaving out the fourth authorized defense -- "waiver" -- and the Court again articulates the "results" of renewal and extension of the guaranty (the actual pleading of this defense being satisfaction, payment and

counterclaim previously delineated by this Court.

Again, no reference is made by the District Court to filing a pleading showing "good cause" before the amended pleading would be considered. Reference is made to the ***"four defenses"*** which were in fact authorized (and, accordingly, which must include "waiver") even though the Court's written order only lists three (3) affirmative defenses and a counterclaim. Lundquist immediately, laboriously, and diligently rewrote his pleadings to fashion them in the manner authorized by the Court's prior order (not the hearing transcripts) and in a legally cognizable form, and filed same prior to November 27, 1995. However, on December 4, 1995 (although not known to Lundquist until December 7, 1995) the Court entered the following order:

> "On November 29, 1995, Defendant supplemented his motion for leave to file the fourth amended answer by seeking to withdraw the reference to the defense of waiver in the fourth amended answer.[12]

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performance by the renewal because the Guaranty only applied to the original note).

12 Even though Lundquist was in fact authorized to plead "waiver", this was done immediately by Lundquist upon learning of the Court' prior written order which did not authorize "waiver" -- in an attempt to soothe the District Court's

> However, the fourth amended answer stilled (sic) contained affirmative defenses not allowed by this Court pursuant to its ruling on November 2, 1995, and order signed November 20, 1995. In particular, *Defendant failed to comply with this ruling and order in* <u>*that he added the affirmative defenses of satisfaction by performance, material alteration*</u>, *release of the guaranty* <u>*and equitable estoppel*</u>. (Emphasis added.)

Lundquist ***was*** authorized to plead *satisfaction by performance and material alteration* -- the Honorable District Court expressly said "OKAY" to those pleadings. Notwithstanding this fact, on December 6, 1995, Lundquist received the final Court Order Denying Lundquist's Motion For Leave To File Fourth Amended Answer" setting forth the following grounds:

> a. "*Defendant has not shown this Court good cause* for modifying the scheduling order's deadline for amendment of the pleadings. *See*, Fed. R. Civ. P. 16(b); ***Spiller v. Ella Smither Geriatric Ctr.*** 919 F.2d 339, 343 (5th Cir. 1990);" . . .
>
> b. "Defendant has further failed to comply with the Court's order of November 20, 1995."

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now obvious opinion that Lundquist was not following orders. Now this request is ammunition against Lundquist.

Previous to this final order, *there was never an indication from the court that absent a showing of "good cause" the Court would not consider amended pleadings* -- ***the Honorable District Court authorized the amended pleadings twice already because*** the Court had expressly authorized Lundquist to amend his pleading even with the ever-changing limitations imposed. However, in a desperate attempt to understand how to appease the Honorable District Court, Lundquist *immediately* filed a Comprehensive Second Motion For Leave in order to set forth "good cause" as referenced by the District Court even though Lundquist had already two orders authorizing and directing amendment. This Second Motion For Leave To Amend pleading set forth substantial good cause, but fell on deaf ears, and all pleadings remained stricken while the District Court proceeded to enter summary judgment against Lundquist.

REASONS FOP GRANTING THE WRIT

1. <u>The Death Penalty Orders Are a Denial of Due Process.</u>

A litigant is entitled to a fair tribunal, and the denial of same is a denial of due process. Lundquist neither desired to challenge, or offend, the trial judge with his pleading attempts, and in

fact followed the rules, and the rulings, of the Court regarding the pleadings proffered. However, a mistake of fact by the trial judge (regarding the authorization and scope of allowed amendments) resulted in a series of punitive actions denying Lundquist due process of law.[13] Such a circumstance is a no-win position for any litigant. Either the order is violated, subjecting a litigant to punishment, or the order is complied with, subjecting the litigant to punishment. Such "catch 22" is a denial of procedural due process in its most basic form. The "the community's sense of fair play . . . " is violated. ***Rochin v. California***, 342 U.S., at 173, 72 S.Ct. at 210.[14] Not only must there be reality of fair trial and impartiality in accordance with due process, but

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13 So that it is perfectly clear, nothing in this Petition should be read to imply that the trial judge was intentionally biased against Petitioner, or had some motive or personal conflict with Petitioner or Petitioner's counsel. Had any such matter been involved, Petitioner would have stated same and raised 28 U.S.C.A. s 455 remedies.

14 *See also* ***Ham v. South Carolina***, 409 U.S. 524, 526, 93 S.Ct. 848, 850, 35 L.Ed.2d 46 (1973); ***Lisenba v. California***, 314 U.S. 219, 236, 62 S.Ct. 280, 289, 86 L.Ed. 166 (1941); ***Hebert v. Louisiana***, 272 U.S. 312, 316, 47 S.Ct. 103, 104, 71 L.Ed. 270 (1926); ***Hurtado v. California***, 110 U.S. 516, 535, 4 S.Ct. 111, 120, 28 L.Ed. 232 (1884).

appearance of fair trial and impartiality must also be exhibited.[15]

The concept of due process incorporates notions of fair notice and warning. See, e.g., ***Postscript Enterprises, Inc. v. Whaley***, 658 F.2d 1249, 1254 (5th Cir. 1981); ***Geiger v. City of Eagan***, 618 F.2d 26, 28 (8th Cir. 1980). Furthermore, a fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. *See, e.g.*, ***Textile Workers Pension Fund v. Standard Dye & Finishing Co.***, 725 F.2d 843, 854 (2d Cir.), *cert. denied sub nom.* ***Sibley, Lindsay & Curr Co. v. Bakery Confectionery & Tobacco Workers Union***, 104 S. Ct. 3554 (1984); ***Lordermill v. Cleveland Bd. of Educ.***, 721 F.2d 550, 563 (6th Cir. 1983), *aff'd*, 105 S. Ct. 1487 (1985).[16] Finally, a death penalty order in a civil case is a clear deprivation of due process, and violates the Constitution.

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15 ***United States v. Ferguson*** , 550 F Supp 1256 (1982, SD NY).

16 It has been held that the individual must have the opportunity to be heard before there can be the deprivation of a protected interest. *See, e.g.*, ***Hatch v. Goerke***, 502 F.2d 1189, 1194-95 (8th Cir. 1974); ***Peacock v. Board of Regents***, 380 F. Supp. 108 (D.C. Ariz. 1974), *aff'd*, 510 F.2d 1324 (9th Cir.), cert. denied, 422 U.S. 1049 (1975).

The facts of this case are far different, and completely distinguishable from those case in which a trial judge relies upon mistaken fact in post-trial actions.[17] Here the trial judge's own error served as the spring board of punitive actions against a litigant which directly, and proximately, cause the denial of due process and a loss of a right to a trial on the merits of a litigants defense to a case.[18] There is "an affirmative constitutional duty to insure that a defendant has a fair trial. . . ." ***Gannett Co. v. DePasquale***, 443 U.S. 368, 378, 99 S.Ct. 2898, 2904, 61 L.Ed.2d 608 (1979) free from the bias of a trial judge's mistake of fact regarding the trial judge's own direction for a litigant to take action later criticized by the same trial judge.

Determining merits of an alleged defense (even the scope of the defense) is not sufficient

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17 See, eg. ***United States v. Dean,*** 752 F.2d 535, 543-45 (11th Cir. 1985) (sentence not illegal merely because judge erroneously assumed Parole Commission would release defendant before end of full sentence; judge's assumption about future event does not fall within due process protection against judge's reliance on materially false information in evidence).

18 *See, eg.* ***Ristaino v. Ross,*** 424 U.S., at 595, 96 S.Ct., at 1021; *See, also,* ***Pacific Mutual Life Insurance Co., v. Haslip,*** 499 U.S. 1, 111 S.Ct. 1032, 1043 (1990) (If the imposition of millions of dollars of liability in this hodge-podge fashion fails to "jar [the Court's] constitutional sensibilities," *ante*, at 1043, it is hard to say what would.)

grounds to *strike the entire pleading*. ***Fox v. City of West Palm Beach***, 383 F.2d 189 (5th Cir. 1967).[19] The Honorable District Court gave no reason for striking the *non-objectionable pleadings*, which is an outright abuse of discretion. ***Foman v. Davis***, 371 U.S. 178, 182 (1962); ***Halbert v. City of Sherman***, 33 F.3d 526, 530 (5th Cir. 1994).

Lundquist's counsel in good faith attempted to, and believes in good faith that he did, comply with the Court's ruling in the Second/Third Amended Answer and Amended Counterclaim. The Honorable District Court authorization to plead the defense of "waiver" and, as important, "that the guaranty is not enforceable by its own terms"[20] was the only pleadings sought to be filed by Lundquist, and required to be in the following format:

(1) "***satisfaction by performance***" (objected to by the District Court) is simply that the "guaranty at issue applies only to the original

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19 *See, eg.*, ***Key Pharmaceuticals, Inc. v. Lowey***, 54 F.R.D. 447, 449, n.5 (D.C.N.Y. 1972).

[20]Premier admits that this Court granted permission of Premier to plead ". . . that the guaranty at issue applies only to the original note. . . . " This defense, however inartfully set forth, must be plead in the form of an appropriate legal defense

note . . ." and therefore, the guaranty has been "satisfied by performance" (the original note was renewed). This defense is exactly what the Honorable District Court approved, although because there is no legally articulated defense that "the guaranty applies to the original note" it is clear what was meant; that the note has been satisfied -- by renewal, or, that indebtedness has been substantially and materially altered -- by renewal.

(2) ***"alteration of indebtedness"*** which is the proper legal way to express the defense that "the guaranty at issue applies only to the original note" because the renewal "altered" the original debt to which the guaranty applied. This is simply a pleading that if the original guaranty is not "satisfied by performance" (*See*, above), it is satisfied, paid, released, or unenforceable by "alteration" *because* the Guaranty applies only to the original note and the renewal is an "alteration" to which the Guaranty did not apply.[21]

Lundquist attempted to precisely comply with the District Court's order, both with

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[21] The general rule in Texas is that a guarantor is not liable on a guaranty if a note has been extended. *See*, ***United States v. Vahlco Corp.***, 800 F.2d 462, 465 (5th Cir. 1986); ***Tomlin v. Ceres Corp.***, 507 F.2d 642, 646 (5th Cir. 1975).

academic honesty and in good faith, as well in a judicially respectful manner. No evidence exists in this record that such attempts at pleadings were in bad faith, argumentatively made, or in any manner sanctionable so as to justify the death penalty orders entered.

2. "After the Fact" Finding That "Good Cause" Was Not Plead Was A Denial of Due Process:

"Good Cause" should not have been an issue in this case. The Honorable District Court already granted permission to file the amended petition, and the issue of the need, basis, and "good cause" were thoroughly discussed in the November 20 hearing. Good cause is only an issue if the amendment has not previously been authorized by an order (eg., pre-trial, scheduling, etc.). To have re-resurrected a "good cause" standard, without notice, and without a hearing, to justify death penalty order striking *all* pleadings is a denial of due process. As a direct result, Lundquist was required to attend trial on a summary judgment without a live pleading, all pleadings responding to Premier's Second

Amended Complaint having been stricken by the Honorable District Court.[22]

Even if Lundquist's counsel was wrong concerning the "right" to file the Second Amended Answer as set forth in Rule 7a, Fed. R. Civ. Proc., the only resulting error was failing to seek leave of the Court prior to filing the proposed Second Amended Answer. Rule 15(a), Fed. R. Civ. P. provides that where leave of court is required to file an amended complaint that "leave shall be freely given when justice so requires." *See, also* ***Forman v. Davis***, 371 U.S. 178, 182 (1962); ***Halbert v. City of Sherman***, 33 F.3d 526, 530 (5th Cir. 1994). And leave was granted -- only later to be taken back on mistaken ground far different that when originally. This Court has recognized the danger of denying a litigant his day in court without pleadings necessary to present his case:

> "Rule 15(a) declares that leave to amend "shall be freely given when justice so requires"; this mandate is to be heeded . . . . If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claims on the

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22 The pleadings were stricken at a time when Premier had not even taken the deposition of Robert D. Thorpe, being taken by agreement after the November 3, 1995 hearing.

merits." ***Forman v. Davis***, 371 U.S. 178, 182 (1962).

Although the Fifth Circuit recognizes this liberal approach of freely granting amendments to pleading, particularly, as here, early in the litigation and the discovery process [. . . the courts have given Rule 15 not lip service merely but full fealty." ***Copeland Motor Co. v. General Motors Corp.***, 199 F.2d 566, 567-68 (5th Cir 1952)].[23] In this case, however, the Fifth Circuit deferred to a "do not publish" opinion regarding a simple mistake by the Honorable District Court obviously resulting from faulty notes or faulting briefing attorney notes. Waiver was a viable defense, and was authorized, but when it became an issue arising from a mistake by the Honorable District Court, the mistake became grounds to simply "move the case" in lieu of retracting the mistaken order and trying the case on its merits. It cannot be argued that Premier did not have adequate time for discovery on all issues raised by the proposed amended pleading and did not suffer any unfair prejudice from the filing of the Amended Complaint. It was only after the Honorable District Judge permitted the filing of

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23 ***Yunclan v. Department of Air Force***, 943 F.2d 1388, 1391 (5th Cir. 1991).

the amended pleading, never mentioning, suggesting, much less requiring, that "good cause" be shown *before* the amendment was authorized, that the issue arose. Good cause existed, in any event, clearly established by the response of Lundquist. This ground was an "after the fact" finding by the Honorable District Court, outside any applicable law and without a basis in fact, and constitutes a denial of Lundquist's due process rights.

3. **The Summary Judgment Was Improper If the Death Penalty Order Had Not Been Rendered:**

Summary judgment could not be sustained *if* Lundquist's pleadings had not been stricken. Lundquist's legal and factual position, supported by his timely filed summary judgment evidence in response in opposition to the Motion For Summary Judgment of Premier, was that:

(i) Premier is not a holder in due course, and

(ii) the Guaranty is not a negotiable instrument, thus Premier took the Guaranty subject to all of Lundquist's defenses, including waiver, laches and estoppel.[24]

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24 Lundquist's Affidavit: Lundquist found out seven (or eight) years later that he *might* be considered liable on the

The ***uncontroverted evidence*** in opposition to the summary judgment includes the Affidavits of Wayne A. Lundquist. This Summary Judgment opposition proof was uncontradicted. There are ***no opposing affidavits or proof from Premier to the Affidavits of Lundquist and Thorpe***, only objections which are addressed herein. ***But for the death penalty order*** the defenses of Lundquist (*at least* those permitted to be filed by the Court's orders) show that material fact issues exist in this case sufficient to overcome a motion for summary judgment.

A. THE DEFENSE AND EVIDENCE IN SUPPORT OF LACHES PREVENTS SUMMARY JUDGMENT

The equitable doctrine of Laches will bar a case before the period set forth in an applicable limitation statute if accompanied by some element of estoppel or extraordinary circumstances that would render it inequitable to enforce the plaintiff's right after the delay.

Guaranty (based on renewed notes) notwithstanding the oral agreement and the terms of the Guaranty. Lundquist promptly hired a lawyer and set out his concern *in writing* to Premier's predecessor in interest, denying liability based on the Guaranty and the oral agreement. No action was ever taken by the RTC or the FDIC on the Guaranty after this notice. Ten (10) years after execution of the Guaranty, Premier (after buying the Guaranty) sued Lundquist, not for the debt provided in the Guaranty, but for a series of renewals long in default.

Barfield v. Howard M. Smith Company of Amarillo, 426 S.W.2d 834, 840 (Tex. 1968); ***Helsley v. Anderson***, 519 S.W.2d 130, 133-134 (Civ. App. -- Dallas 1975, no writ). Laches prevents a party from having to defend against "stale" claims ***even if limitations has not run.*** *See*, ***Burbee v. Castlewood Civic Club***, 737 S.W.2d 366, 369 (Tex.App. -- Houston [14th Dist.] 1987, no writ. Claims become "stale" when the evidence becomes lost, whether due to the death or disappearance of witnesses, faded memories, the disappearance of documents, and so forth. *See* ***Murray v. San Jacinto Agency, Inc.***, 800 S.W.2d 826, 828 (Tex. 1990). These facts are established by the affidavits of Lundquist.

B. THE DEFENSE AND EVIDENCE IN SUPPORT OF PROMISSORY ESTOPPEL PREVENTS SUMMARY JUDGMENT:

This Court's Summary Judgment ignores the uncontroverted facts establishing a right to the defense of equitable estoppel.[25] Each element of promissory estoppel is established in the record in this case. Lundquist relied on a promise, and waited *almost eleven years* to

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25 It is important to note that promissory estoppel and equitable estoppel are often interchangeable terms in Court opinions. ***Wilson v. Alexander,*** 50 S.W.2d 440, 441 (Civ.App.-- Ft. Worth 1932), rev'd on other grounds, 77 S.W.2d 873.

discover that a "vulture fund" was suing him on the Guaranty. Promissory estoppel is primarily a defensive plea that prevents a party from insisting on strict legal rights when it would be unjust to enforce them.[26] Estoppel operates to prevent one who has induced another to act in a particular way from adopting an inconsistent position, attitude, or course of conduct that will cause loss or injury to the other person and when one party, because of the other party, has been induced to change his or her position for the worse.[27] *The facts offered in support of the defense of estoppel, and in opposition to the summary judgment were uncontroverted,*[28] yet summary judgment, with no pleadings in opposition, was entered.

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26 *See* ***"Moore" Burger, Inc. v. Phillips Petroleum Company***, 492 S.W.2d 934, 936 (Tex. 1972). (Promissory estoppel prevents a defendant who had promised to sign a lease but failed to do so from relying on the statute of frauds as a defense to an action for breach of the lease.

27 ***Houtchens v. Matthews***, 557 S.W.2d 581, 585 (Tex. Civ. App.—Fort Worth 1977); ***Swiderski v. Prudential Property & Cas. Ins.***, 672 S.W.2d 264, 269 (Tex.App. -- Corpus Christi 1984, writ dis.).

28 Promissory Estoppel can operate to prevent a party from exercising or insisting on a contractual term or limitation. ***Hampton v. State Farm Mut. Auto Ins.***, 778 S.W.2d 476, 479 (Tex. App.—Corpus Christi 1989, no writ). ***Roberts v. Haltom City***, 543 S.W.2d 75, 80 (Tex. 1976). ***Texas Bank & Trust v. Lone Star Life Ins.***, 565 S.W.2d 353, 358 (Civ. App.—Tyler 1978, no writ).

C. PAROL EVIDENCE RULE DOES NOT APPLY -- ADDITIONAL OR SUPPLEMENTAL TERMS OR AGREEMENTS SHOULD HAVE BEEN CONSIDERED

It is uncontroverted (for summary judgment purposes) that at the signing of the Guaranty, Lundquist was told by an authorized representative of Premier's successor that his guaranty would only apply to the initial Note and would only be in force and effect for the term of the Note; and that if the Note was renewed and extended he would have no liability thereafter. *No contrary evidence was proffered by Premier to overcome this contention.*

In addition, a *"collateral agreement" is* one that the parties might naturally make separately and that they would not ordinarily be expected to embody in writing, and must not be so clearly connected with the principal transaction as to be part and parcel of it. ***Boy Scouts v. Responsive Terminal Systems***, 790 S.W.2d 738, 745 (Tex. App.— Dallas 1990, den.)].[29] The evidence

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29 The parol evidence rule does not apply when there is not a complete identity of parties and subject matter between the contract being interpreted and the evidence proffered of some other agreement particularly where it appears a separate agreement was made. *See* ***Smith v. Smith***, 794 S.W.2d 823, 828 (Tex. App.—Dallas 1990, no writ). It is uncontroverted that the Guaranty was an agreement between six parties (five

offered by Lundquist clearly establishes that the dealings with Sue Beagle, an agent of Victoria Savings Association, were not excluded by application of the parol evidence rule on both grounds for a collateral agreement.

Controverted facts exist which should have prevented summary judgment.

CONCLUSION

Lundquist has been punished without a violation of laws or rules. His attempt to satisfy the Honorable District Court were appropriate, within the rules, and respectful. The Honorable District Court made a mistake, yet instead of acknowledging same and entering an order limiting "any" pleading's scope effectively ignored the error, added additional burdens "after the fact" and entered a "death penalty" order denying a due process forum. Accordingly, Lundquist requests that the judgment of the Honorable District Court be reversed and the case set for trial on the merits.

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guarantors and VSA) and the evidence offered by Lundquist relates only to a "collateral agreement" dealing with VSA and one Guarantor, Lundquist. Application of the parol evidence rule is improper and defeats summary judgment.

Dated: March 5, 1997.

Respectfully submitted,

Shelby A. Jordan
Attorney for Petitioner

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Supreme Court, U.S.
FILED

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IN THE
SUPREME COURT OF THE UNITED STATES
1996 TERM

WAYNE A. LUNDQUIST, JR., PETITIONER

-VS-

PREMIER FINANCIAL SERVICES - TEXAS, L.P.,
RESPONDENT

APPENDIX

TO

PETITION FOR A WRIT OF CERTIORARI

Shelby A. Jordan
JORDAN, HYDEN, WOMBLE AND CULBRETH, P.C.
900 NationsBank Center North
Corpus Christi, Texas 78471
Telephone No. (512) 884-5678
Telecopier No. (512) 888-5555

ATTORNEY IN CHARGE FOR PETITIONER

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54 pp

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 96-40079
Summary Calendar

PREMIER FINANCIAL SERVICES - TEXAS L. P.,
Plaintiff-Counter Defendant-Appellee,

VERSUS

WAYNE A. LUNDQUIST, JR., ET AL.,
Defendants,

WAYNE A. LUNDQUIST, JR.,
Defendant-Counter ClaimantAppellant.

Appeal from the United States District Court
For the Southern District of Texas
(C-94-CV-545)

Before JONES, DeMOSS, and PARKER, Circuit Judges.

PER CURIAM*

On July 26, 1996, this Court stayed further

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* Pursuant to Local Rule 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.

consideration of this appeal pending an order of the United States Bankruptcy Court for the Southern District of Texas lifting the automatic stay of that court in the Chapter 11 bankruptcy proceeding No. 96-22457-C11 filed by appellant Wayne A. Lundquist, Jr. Such automatic stay has now been lifted by the bankruptcy court and we proceed with consideration of this appeal.

Premier Financial Services - Texas L.P. ("Premier") sued Wayne A. Lundquist, Jr. ("Lundquist") and others on a written guaranty agreement executed by Lundquist, guaranteeing the payment of a promissory note dated October 24, 1983, executed by Nueces Development Company payable to Victoria Savings Association in the original principal sum of $793,000 one year after date. The maturity date of this note was ultimately extended by various renewal and extension agreements until September 19, 1987. The Resolution Trust Corporation ("RTC") was appointed conservator of Victoria Savings Association on June 29, 1989. In December 1990, after making demand on the maker and Lundquist for payment of this note, the RTC proceeded to foreclose upon the secured property and sold the secured property at public auction for the sum of $161,028, which was credited against the note. In January 1994, the RTC as receiver for Victoria Savings Association FSA. transferred the note and guaranty, along with all right, title and interest therein, to Premier. On December 16,

1994, Premier brought this suit upon his guaranty against Lundquist seeking to
the remaining amounts due and owing on the note. In September 1995, Premier moved for a summary judgment on its claims against defendant Lundquist and on Lundquist's counterclaim against Premier. On December 6, 1995, the district court granted Premier's motion for a summary judgment and by a corrected final judgment entered under date of December 29, 1995, granted recovery in the amount of $606,345.08 against Lundquist.

We have carefully reviewed the briefs, the record excerpts and relevant portions of the record itself; and for the reasons stated by the district court in its order granting motion for summary judgment entered under date of December 6, 1995, we affirm the final judgment entered under date of December 29, 1995.

AFFIRMED.

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 96-40079

PREMIER FINANCIAL SERVICES - TEXAS L. P.,
Plaintiff-Counter Defendant-Appellee,

v.

WAYNE A. LUNDQUIST, JR., ET AL.,
Defendants,

WAYNE A. LUNDQUIST, JR.,
Defendant-CounterClaimant-Appellant.

Appeal from the United States District Court
For the Southern District of Texas, Corpus Christi

Before JONES, DeMOSS, and PARKER, Circuit Judges.

IT IS ORDERED that the petition for rehearing filed in the above case is denied.

ENTERED FOR THE COURT: (Filed December 5, 1996)

/S/ Harold R. DeMoss

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

PREMIER FINANCIAL SERVICES - TEXAS, L.P., Plaintiff	§	
	§	C.A. No. C-94-545
VS.	§	
WAYNE A. LUNDQUIST, JR. and JAMES E. GUNN, Defendants.	§	

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

On this date came on to be considered a Motion for Summary Judgment by Plaintiff Premier Financial Services - Texas, L.P. ("Premier") against Defendant Wayne A. Lundquist ("Lundquist").

I. JURISDICTION

This Court has jurisdiction on the basis of diversity of citizenship of the parties pursuant to 28 U.S.C. § 1332.

II. FACTS AND PROCEEDINGS

On October 24, 1983, Nueces Development Company ("Debtor") executed and delivered to Victoria Savings Association a Promissory Note ("Note") whereby Debtor promised to pay unto the order of Victoria Savings Association the principal sum of

$793,000.00, together with interest thereon on or before the expiration of 365 days from the date of the execution of the Note. The Note was subsequently extended and renewed by various extension and renewal agreements dated November 21, 1984, July 24, 1984, July 22, 1986, and March 30, 1987. Pursuant to the terms of the last extension and renewal agreement, the Note matured on September 19, 1987.

Also on October 24, 1983, Nueces Development Company executed and delivered a Deed of Trust Security Agreement Financing Statement-("Deed of Trust"), conveying to the Trustee for the benefit of Victoria Savings Association, and its successors and assigns, certain property as security for the debt owed on the Note. Further, on that same date, Defendant Lundquist, along with others, by and through a Guaranty Agreement ("Guaranty"), individually guaranteed in writing the payment of the indebtedness evidenced by the Note.

The Resolution Trust Corporation ("RTC") was appointed conservator of Victoria Savings Association on June 29, 1989. On December 11, 1990, in its capacity as conservator of Victoria Savings Association, the RTC made demand upon Nueces Development Company and Defendant Lundquist for payment of the Note. Both Nueces Development Company and Lundquist failed to meet such demand. As a result, the RTC proceeded with

the foreclosure sale of the secured property pursuant to the terms of the Deed of Trust. The property sold at public auction for the sum of $161,028. After the application of the sale price to the unpaid balance on the Note, a balance of $606,345.08 remained due and owing on the Note, including principle, interest, and attorney's fees.

On January 14, 1994, the RTC as receiver for Victoria Savings Association, F.S.A., transferred the subject Note and Guaranty, along with all right, title and interest therein to Plaintiff Premier. On December 16, 1994, Premier brought this cause of action to recover the amount owed and due plus interest against Defendant Lundquist based upon his guarantee of the note.

On June 14, 1995, this Court granted Defendant's motion for leave to file a first amended answer, affirmative defenses, and counterclaim ("first amended answer") Defendant's first amended answer is the only proper pleading before this Court at this time In the first amended answer, Defendant raises the following affirmative defenses to Plaintiff's cause of action: (1) Texas's four-year statute or in the alternative, the doctrine of laches bars Plaintiff's suit; (2) wrongful foreclosure; and (3) usury As a counterclaim, Defendant asserts that the Guaranty Agreement is usurious on its face.

On September 20, 1995, Premier moved for Summary Judgment on its entire claim against Defendant Lundquist, and on Defendant Lundquist's counterclaim against Plaintiff for usury. On October 13, 1995, Plaintiff supplemented its Motion for Summary Judgment with a Reply to Defendant's Response to Premier's Motion for Summary Judgment.

III. DISCUSSION

A. Standard for Summary Judgment

Summary judgment is proper, pursuant to FED.R.CIV.P. 56(c), when "the pleadings, depositions, answers to interrogatories, and admissions file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." A party seeking summary judgment bears the initial burden of informing the Court of the basis for its motion and of identifying those portions of the record and affidavits which evidence an absence of material fact. Celotex Corp. v Catrett, 477 U.S. 317, 324 (1986). Once the movant has met its burden, it is then incumbent upon the non-movant to show that disputed issues of fact remain State Farm Life Ins. Co. v. Gutterman, 896 F 2d 116, 118 (5th Cir 1990). The Court, in turn, must view all inferences from the evidence in the light most favorable to the non-movant. Anderson v. Liberty Lobby Inc., 477 U.S. 242, 255 (1986).

The movant's summary judgment evidence must sufficiently indicate the failure of an essential element of the non-movant's claim. Celotex Corp., 477 U.S. at 322. A complete failure of proof on an essential element renders all other facts immaterial because there is no longer a genuine issue of material fact. Id. at 323. Rule 56(c) requires the Court to enter summary judgment if the evidence favoring the non-moving party is not sufficient for the jury to enter a verdict in his favor. Anderson, 477 U.S. at 249.

In proceedings under Rule 56(c), documents and exhibits identified by affidavit may be submitted to support a motion for summary judgment. First Nat'l Bank Co. of Clinton Ill. v Insurance Co of North Am., 606 F.2d 760, 766 (5th Cir. 1979). Along with its Motion for Summary Judgment, Premier provided an affidavit of Lisa A. Bullock, an asset manager of Premier, which identified copies of the Note, Guaranty, loan agreement, Deed of Trust, and the renewal and extension agreements. In Defendant's First Amended Response to Premier's Motion for Summary Judgment, Lundquist provided an Affidavit by Robert Thorpe and himself.

B. Defendant's Usury Counterclaim and Affirmative Defense

As an affirmative defense and counterclaim, Defendant maintains that the Guaranty constitutes a contract for, or a charge of, interest in a greater amount

than permitted by law. Under Texas law, usury is defined as "interest in excess of the amount allowed by law." TEX.REV.CIV.STAT.ANN art 5069-1.01(d). The essential elements of a usurious transaction are (1) a loan of money; (2) an absolute obligation that the principal be repaid; and (3) the extraction from the borrower of a greater compensation than the amount allowed by law for the use of money by the borrower. Holley v. Watts, 629 S.W.2d 694, 696 (Tex. 1982).

Where a transaction appears lawful on its face, the party claiming usury has the burden of proof. American Century Mortgage Investors v Regional Center. Ltd., 529 S.W.2d 578, 583 (Tex.Civ.App.--Dallas 1975, writ ref'd n.r.e.). Conversely, where the loan instruments show on their face that the loan is usurious, the lender has the burden to prove that the terms of the loan resulted from accidental and bona fide error. Miller v. First State Bank, 551 S.W.2d 89, 99 (Tex.Civ.App.--Fort Worth 1977), modified on other grounds, 563 S.W.2d 572 (Tex. 1978). Here, the Court finds that the Guaranty appears lawful on its face, and therefore, Lundquist has the burden of proof on the claim of usury See, American Century Mortgage Investors, 529 S.W.2d at 583.

The Court finds that Lundquist has not met his burden of proof He offers no credible evidence establishing that the Guaranty is usurious or that the any of the elements for a claim of usury have been satisfied.

Lundquist contends that the Guaranty is usurious since, as written, it provides for his liability even if the Debtor has satisfied its obligations under the Note. To support this allegation, Lundquist directs the Court's attention to language in the Guaranty providing that if the

> Borrowers are not liable, for any reason, for any reason, for the amounts due or which may become due under the said promissory note . . such facts shall in no manner affect the liability of the Guarantors hereunder, but the Guarantors shall be and remain liable herein notwithstanding said Borrowers be not liable for such indebtedness, and to the same extent as the Guarantors would have been liable if the indebtedness of said Borrower has been enforceable against them.

(Pl.'s Mot Summ. J Ex. A-2, Guaranty Agreement at 2). This Court disagrees with Defendant's construction of the Guaranty since it previously found that such interpretation of the Guaranty Agreement was unconvincing at best when the Court denied Defendant's motion for summary judgment on his counterclaim for usury on July 24, 1995.

Further, even assuming Defendant presented some evidence that the Guaranty is usurious, this claim would fail as a matter of law since the Guaranty refers to the Note which contains a usury savings clause. Texas

courts have repeatedly acknowledged the validity of usury savings clauses and enforce such clauses to defeat violations of the usury laws. Woodcrest v. Commonwealth Mortgage, 775 S W 2d 434, 437 (Tex. App --Dallas 1989). The Court examines the usury savings clause in the Note because "[t]he question of usury must be determined by a construction of all the documents constituting the transaction, interpreted as a whole, and in light of the attending circumstances." Tygrett v University Gardens Homeowners' Ass'n, 687 S W 2d 481, 485 (Tex.App.--Dallas 1985, writ ref'd n.r.e.). The usury savings clause reads as follows:

> All agreements between Maker and Payee are expressly limited so that no contingency or event whatsoever shall the amount paid, or agreed to be paid, to Payee for the use, forbearance, or detention of the money to be lent hereunder exceed the maximum amount permissible under applicable law. If, from any circumstances whatsoever, fulfillment of any provision hereof at the time such performance is due would involve transcending the limit of validity prescribed by law, then ipso facto the obligation to be fulfilled shall be reduced to the limit of such the obligation to be fulfilled shall be reduced to the limit of such validity, and if from any circumstances Payee shall receive as interest an amount that would exceed the highest lawful rate, such amount that would be excessive interest shall be applied to the reduction of the principal

amount owing hereunder, or shall be refunded, but shall not be applied to payment of interest.

(Pl.'s Mot. Summ. J. Ex. A-l, Promissory Note at 1).

The Court finds that the preceding provision in the Note constitutes a valid usury savings clause. As such, even if Lundquist could show some evidence that the Guaranty Agreement is usurious, this claim would fail since the Court would enforce the usury savings clause to defeat a violation of the usury laws.

Accordingly, the Court GRANTS Plaintiff's Motion for Summary Judgment on Defendant's usury counterclaim, and affirmative defense.

B. Plaintiff's Claim Under Guaranty Agreement

Premier moves for summary judgment on its claim against Defendant Lundquist under the Guaranty Agreement To prevail in its motion for summary judgment, Premier must establish that (1) Defendant executed the guaranty; (2) that the underlying note is in default; (3) that Plaintiff is the present holder of the guaranty; and (4) that a certain balance is due and owing. Sunbelt Sav. FSB. Dallas Tex. v Birch, 796 F.Supp. 991, 995 (N.D. Tex. 1992); Universal Metals and Machinery. Inc v Bohart, 539 S.W.2d 874, 877-78 (Tex. 1976).

In the present case, the uncontroverted facts establish all four elements for a cause of action under a guaranty agreement. First, on October 24, 1983, Defendant, along with others, executed the Guaranty

Agreement by individually promising in writing the payment of the indebtedness evidenced by the Note. Second, the underlying note is in default since Debtor and Defendant refused to pay the RTC the indebtedness under the Note when the RTC demanded payment. Third, Premier established that it is a holder of the Guaranty through the affidavit by Lisa E. Bullock. (Pl.'s Mot. Summ J. Ex. A). A party can show its status as an owner or the holder of a guaranty by offering an affidavit sworn copy of the Guaranty. Zarges v. Bevan, 652 S W 2d 368, 369 (Tex 1983); Life Ins. Co. v. Gar-Dal. Inc., 570 S.W 2d 378, 380 (Tex. 1979); State Sav. & Loan Ass'n v. Liberty Trust Co., 863 F 2d 423, 426 (5th Cir 1989) Fourth, the affidavit of Lisa E. Bullock establishes that a certain amount is due and owing under the Note--i.e., $606,345.08 together with interest from and after January 1, 1991, at the rate allowed by the laws as provided in the Note, together with costs (Pl 's Mot. Summ. J. Ex. A).

In addition, a district court may properly grant summary judgment when a contract is unambiguous, but may not grant summary judgment when a contract is ambiguous and the parties' intent presents a genuine issue of material fact. Southern Natural Gas Co. v. Pursue Energy, 781 F.2d 1079, 1081 (5th Cir. 1986); Union Planters National Leasing. Inc. v. Woods, 687 F.2d 117, 120 (5th Cir. 1982); Freeman v. Continental Gin Co, 381

F.2d 459, 465 (5th Cir. 1967). Pursuant to this principle, the Fifth Circuit has held that summary judgment is particularly appropriate for suits on promissory notes[1] and in cases where the language of a guaranty contract is clear.[2] This suit particularly invites summary judgment since it requires little more than this Court's interpretation of an unambiguous written guaranty agreement.

The Texas rules for interpreting guaranty agreements are well-established. In construing a guaranty contract, the primary concern for this Court is to ascertain the intent of the parties Coker v. Coker, 650-S.W.2d 391, 333 (Tex 1983). In order for a guaranty to be enforceable it must, with reasonable clearness, evidence an intent on the part of the party to become liable on an obligation in the event of default by the primary obligor. Block v. Aude, 718 S.W.2d 914, 915 (Tex.App --Beaumont 1986, no writ).

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1 FDIC v. Cardinal Oil Well Servicing Co. Inc., 837 F.2d 1369, 1371 (5th Cir. 1988) ("Typically suits on promissory notes provide fit grist for the summary judgment mill").

2 Resolution Trust Corp. v. Marshall, 939 F.2d 274, 276 (5th Cir. 1991).

If a guaranty is ambiguous, this Court must apply the "construction which is the most favorable to the guarantor." Coker, 650 S.W.2d at 394 n. 1. However, if the guaranty "can be given a certain or definite meaning or legal interpretation, then it is not ambiguous and the court will construe the contract as a matter of law." Coker, 650 S.W.2d at 393. When a guaranty's terms are plain and unambiguous, a federal court will enforce the guaranty according to those terms. NCNB Texas Nat. Bank v. Johnson, 11 F.3d 1260, 1266 (5th Cir.), reh'g denied, 19 F.3d 17 (5th Cir. 1994).

Under Texas law, the rule of strictissimi juris applies after the terms of the guaranty agreement have been ascertained McKnight v. Virginia Mirror Co., 463 S.W.2d 428, 430 (Tex. 1971). This rule prohibits the extension of the guarantor's obligations by implication beyond the written terms of the agreement. Clark v. Walker-Keith Lumber Co., 689 S.W.2d 275, 278 (Tex.App.-- Houston [1st Dist.] 1985, writ ref'd n.r.e.). However, this rule does not abrogate the principle applicable to all contracts that, in their interpretation, the Court must ascertain the true intent of the parties who executed them Preston Ridge Financial Services Corp. v Tyler, 796 S W 2d 772, 780 (Tex App --Dallas 1990, reh'g denied).

Applying these settled rules of contract construction to the Guaranty Agreement, the Court finds

that the parties' intent is clear that Defendant Lundquist is to be held liable as a guarantor for indebtedness evidenced by the Note. The plain language of the guaranty states:

> In the event that any one or more of the Borrowers are not liable, for any reason, for the amounts due or which may become due under said promissory note, or in the event the said promissory note cannot be enforced against any one or more of the Borrowers, then, in any such event, such facts shall in no manner affect the liability of the Guarantors hereunder, but the Guarantors shall be and remain liable for such indebtedness, and to the same extent as the Guarantors would have been liable if the indebtedness of said Borrowers has been enforceable against them.

(P.'s Mot. Summ. J. Ex. A-2, Guaranty Agreement at 2-3).

Thus, the unambiguous language of this provision provides that the Defendant Guarantor is liable for the "indebtedness" under the Note if the borrowers are not liable "for any reason" for "the amounts due or which may become due" under the Note. This provision also shows no expression of intent to hold the Defendant Guarantor liable if the Note has been paid. Specifically, the Guaranty Agreement provides that "the Guarantors shall be and remain liable for such indebtedness ... to the same extent as the Guarantors would have been liable if

the indebtedness of said Borrowers has been enforceable against them."

The undisputed facts establish the elements for a cause of action under the Guaranty Agreement, and the Court finds that the Guaranty Agreement is clear and unambiguous. Therefore, unless Defendant Lundquist establishes a valid affirmative defense, the Court shall issue summary judgment in favor of Premier.

C. Defendant's Affirmative Defenses

(a) Statue of Limitations Defense

Defendant asserts as an affirmative defense that Plaintiff's action is barred by Texas's four-year statute of limitations. See, Tex.Civ.Prac. & Rem Code. § 16.004(a)(3) (Vernon's 1986). Lundquist contends that this four-year limitations period ran on October 24, 1988--approximately four years after the Note's maturity date on October 23, 1984. Plaintiff argues that the four-year period does not bar this suit on the ground that this action is governed by the six-year statute of limitations period under the Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA), 12 U.S.C. § 1821(d)(14).

FIRREA provides that the statute of limitations on contract claims is the longer of the six-year period beginning on the date the claim accrues or the period applicable under state law. See, 12 U.S.C. § 1821(d)(14)(A). The statue of limitations begins to run on

the date the FDIC[3] is appointed receiver or conservator or the date the cause of action accrues, whichever is later. See, 12 U.S C. § 1821(d)(14)(B)

As a general rule, a special federal limitations period will not revive a claim already barred under state law FDIC v Belli, 981 F.2d 838, 842 (5th Cir. 1993); Jackson v Thweatt, 883 S.W 2d 171, 177 (Tex.), cert. denied, 115 S.Ct 196 (1994). This rule does not apply in this case, however, as the claim against Lundquist was not stale against Lundquist when the RTC was appointed conservator of Victoria Savings Association on June 29, 1989. Under the last extension and renewal agreement, the Note matured on September 19, 1987. As a result, the RTC's claim against the Debtor, Nueces Development Company, and Lundquist for payment of the Note was not time barred under the Texas four-year statute of limitations period since the RTC was appointed conservator less than two years after Note matured under the last extension agreement.

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3 The RTC was appointed conservator of Victoria Savings Association on June 29, 1989 The RTC has the same rights and powers as the FDIC under 12 U.S.C. § 1821(d)(14)(A) and (B). When acting as receiver or conservator of an insured depository institution, the RTC is deemed to be an agent of the United States by virtue of the provisions of 12 U.S.C. § 1441a(b)(1)(A). Under the provision of 12 U.S.C. § 1441a(b)(4)(A), the RTC, as receiver, has the same rights and powers as does the FDIC under 12 U.S C §§ 1821-1823.

Since a cause of action for payment of the Note was not stale when the RTC was appointed conservator on June 29, 1989, the RTC obtained the benefits of the six-year limitation period under section 1821(d)(14). Even though FIRREA became effective on August 9, 1989, before the RTC was appointed conservator of Victoria Savings Association, the RTC still benefited from this 1821(d)(14)'s limitations period as the Fifth Circuit and Texas Supreme Court hold that this provision applies retroactively to causes of action in-existence when FIRREA was enacted on August 9, 1989. Davidson v. FDIC, 44 F.3d 246, 248 (5th Cir 1995); Belli, 981 F.2d at 842; Jackson, 883 S.W 2d at 177.

Here, it is established that Texas's four-year statute of limitations did not bar the RTC's action for payment under the note when it was appointed conservator. Therefore, since this claim existed on August 9, 1989, the RTC benefited from the six-year limitations period under section 1821(d)(14).

FIRREA's six-year limitations period applies to Premier's claim against Defendant Lundquist. The Fifth Circuit and the Texas Supreme Court hold that section 1821(d)(14) applies to actions brought by purchasers of assets from the FDIC or RTC pursuant to the common-law maxim that an assignee stands in the shoes of its assignor. FDIC v. Bledsoe, 989 F.2d 805, 810 (5th Cir. 1993); Jackson, 883 S.W.2d at 174. On January 14, 1994,

the RTC, while acting as receiver for Victoria Savings Association, transferred the Note and Guaranty Agreement along with all right, title, and interest therein to Plaintiff Premier. Since Premier brought this cause of action to recover amounts owed and due under the Guaranty on December 16, 1994, Premier's action was not barred by FIRREA's six-year limitations period which expired in June 1995. Therefore, Defendant's contention that Texas's four-year statute of limitations period bars Plaintiff/s suit fails as a matter of law.

In addition, Defendant contends that the limitations period in TEX.PROP CODE ANN. § 53 001 et seq. (Vernon 1995) bars Plaintiff's suit Section 53 of the Texas Property Code applies to mechanic's, contractor's or materialman's liens. As a matter of law, the Court finds that these provisions are not relevant Plaintiff's cause of action as this case does not involve a mechanic's, contractor's or materialman's lien.

The Court notes that Defendant may have made a typographical error when he cited Section 53.001 et seq. in his pleading. Possibly, Defendant intended to cite TEX.PROP.CODE. ANN. § 51.003 (Vernon 1995). Section 51 et seq. would be relevant to this case as it contains general lien provisions and since § 51.003 is a statute of limitations provision. Section 51.003 provides that, if real property is sold at a foreclosure sale for a price less than the unpaid balance of the indebtedness securing it, "any

action brought to recover the deficiency must be brought within two years of the foreclosure sale and is governed by this section." TEX.PROP.CODE.ANN. § 51.003 (Vernon 1995).

Assuming arguendo that Lundquist actually intended to argue that section 51.003 bars Plaintiff's suit, this contention fails as a matter of law. As established earlier, Premier is an assignee of the RTC, and accordingly, benefits from the six-year statute of limitations in § 1821(d)(14). Jackson, 883 S.W.2d at 174; Trunkhill Capital Inc. v. Jansma, 905 S.W.2d 464, 467-469 (Tex App.--Waco 1995, n w.h.).

(b) Equitable Doctrine of Laches Defense

In the alternative, Defendant contends that if the statute of limitations does- not bar Plaintiff's suit, then the equitable doctrine of laches precludes Plaintiff's cause of action.

Under Texas law, laches is an affirmative defense that must be considered in light of the facts of each case. A defendant asserting laches as a defense must plead and prove (1) an unreasonable delay in bringing a claim and (2) detrimental good faith change of position because of the delay. Clark v. Amoco Production Co., 794 F.2d 967, 971 (5th Cir. 1986). Texas law provides that doctrine of laches does not apply to an action that comes within the provisions of a particular statute of limitations. Id. at 972; FDIC v. Spain, 796 F.Supp. 241,

243 (W.D. Tex. 1992); Transportation League. Inc. v. Morgan Express Inc., 436 S.W 2d 378, 388 (Tex.Civ.App.--Dallas 1969, ref. n.r.e).

In the instant case, the six-year statute of limitations in 12 U.S.C § 1821(d)(14) applies to Premier's cause of action. Bledsoe, 989 F.2d at 810. This period did not expired when Premier brought this suit. Therefore, as a matter of law, the doctrine of laches is unavailable as a defense. Clark, 794 F 2d at 972.

(c) Wrongful Foreclosure Defense

As an affirmative defense, Defendant contends that the predecessor to the Guaranty conducted an improper foreclosure sale in violation of TEX.PROP.CODE ANN. § 51.002 (Vernon 1995).

However, a guarantor's right to insist upon the proper disposition of realty securing a promissory note can be waived Long v. NCNB-Texas Nat'l Bank, 882 S.W 2d 861, 869 (Tex App.Corpus Christi 1994, n w.h.) (citations omitted) See also. FDIC v Coleman, 795 S.W.2d 706, 710 (Tex. 1990). Notice of sale to be made in connection with foreclosure can be waived contractually Micrea Inc. v Eureka Life Ins Co of Am , 53 S.W.2d 348, 356 (Tex.Civ.App.--Fort Worth 1976, ref n r.e.).

Plaintiff contends that Defendant waived the defense of irregular or wrongful foreclosure under the clear terms of the Guaranty Agreement. The clear language of the Guaranty provides:

Guarantors hereby agree that the Lender may, from time to time without notice to the Guarantors, at its discretion, and with or without valuable consideration, renew, extend or change the time of payment and/or the manner, place or terms of payment of said promissory note, or any part thereof, allow substitution or withdrawal of any collateral, or may release any security held in connection with said promissory note or any person or party liable thereon; and the exercise by the Lender of any right or power conferred upon it by any agreement with any of the Borrowers or with any of the Guarantors individually, or with any other person or party, shall be wholly discretionary with the Lender, and such exercise of, or failure to exercise, such right or power shall in nowise impair or diminish the obligations and liability of the Guarantors hereunder.

The Lender, its successors and assigns, shall not be liable for failure to use diligence in collection of any amounts due or which may become due under the terms of said promissory note hereby guaranteed, or in presuming the liability of any person under said promissory note or this guaranty; and the Guarantors hereby expressly waive notice to the Guarantors of the acceptance of this guaranty, presentment for payment, notice of dishonor, notice of protest, and protest of said promissory notice, diligence in bringing suit against any person, natural or artificial, liable on said promissory note or this guaranty, and waive notice of and consent to any of

> forbearance by the Lender any renewal, extensions, rearrangement or assignment of said promissory note.

(Pl 's Mot. Summ. J. Ex. A-2, Guaranty Agreement at 2).

The Court finds that the preceding provisions demonstrate that Defendant relinquished his rights to insist upon proper disposition of the collateral securing the promissory note Under Coleman and Long , supra, such an explicit disavowal of any interest in the security precludes the right to object to the manner of the collateral's disposition. Therefore, under the clear terms of the Guaranty Agreement, the Court finds that Defendant contractually waived his rights to insist upon proper disposition of the realty securing the Note or notice of the foreclosure sale.

(d) Usury

This affirmative defense also fails as discussed earlier by the Court in section III., subsection B.

IV. CONCLUSION

For the Forgoing reasons, the Court hereby GRANTS

Plaintiff's Motion for Summary Judgment on Defendant's counterclaim against Plaintiff for usury, and on its entire claim against Defendant

SIGNED and ENTERED on this 4th day of December 1995.

/s/ Janis Graham Jack
JANIS GRAHAM JACK
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

PREMIER FINANCIAL SERVICES - TEXAS, L.P., Plaintiff	§	
	§	C.A. No. C-94-545
VS.	§	
WAYNE A. LUNDQUIST, JR. and JAMES E. GUNN, Defendants.	§	

ORDER GRANTING MOTION TO CORRECT FINAL JUDGMENT

On this 28th day December 199 __ , came on to be considered Plaintiff's Motion to Correct Final Judgment, and the Court, after having considered the same, is of the opinion and finds that the Motion is with merit and should be GRANTED; it is therefore

ORDERED that Plaintiff's Motion to Correct Final Judgment is hereby GRANTED in its entirety; it is further

ORDERED that Plaintiff's Motion for Default Judgment, as reurged by Plaintiff, against Defendant James E. Gunn is hereby granted; it is further

ORDERED that the Final Judgment entered in this cause on December 6, 1995 is hereby amended to add the following:

In accordance with the Court's Order Granting Plaintiff's Motion for Summary Judgment, it is ORDERED, ADJUDGED AND DECREED that Plaintiff, Premier Financial Services - Texas, L.P., have and recover, from Defendants, Wayne A. Lundquist, Jr. and James E. Gunn, jointly and severally, judgment for:

1. Six Hundred Six Thousand Three Hundred Forty-Five and 08/100 Dollars ($606,345.08);

2. (Deleted by Judge).

3. Post-judgment interest on the judgment at the rate of five and 45/100 per cent (5.45%) per annum from date of judgment until paid; and

4. Costs of court;

for all of which let execution issue.

SIGNED this 28th day of December, 1995.

/s/ Janis Graham Jack
JANIS GRAHAM JACK
UNITED STATES DISTRICT JUDGE

Order submitted by:

Julia A. Cook
State Bar No. 01196200
5847 San Felipe, Suite 1700
Houston, Texas 77057

Telephone: (713) 785-1700
Facsimile: (713) 785-2091

Of Counsel:

SCHLANGER, MILLS, MAYER &
GROSSBERG, L.L.P.
5847 San Felipe, Suite 1700
Houston, Texas 77057
Telephone: (713) 785-1700
Facsimile: (713) 785-2091
Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

PREMIER FINANCIAL SERVICES - TEXAS, L.P., Plaintiff	§	
	§	C.A. No. C-94-545
VS.	§	
WAYNE A. LUNDQUIST, JR. and JAMES E. GUNN, Defendants.	§	

FINAL JUDGMENT

In accordance with its Order Granting Motion for Summary Judgment, the Court enters final judgment dismissing this cause.

Final Judgment is rendered.

Signed on the 4th day of December, 1995.

/s/ Janis Graham Jack
JANIS GRAHAM JACK
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

PREMIER FINANCIAL SERVICES - TEXAS, L.P., Plaintiff	§	
VS.	§	C.A. No. C-94-545
WAYNE A. LUNDQUIST, JR. and JAMES E. GUNN, Defendants.	§	

ORDER DENYING DEFENDANT'S MOTION FOR LEAVE TO FILE FOURTH AMENDED ANSWER, AFFIRMATIVE DEFENSES, AND TO REFILE SECOND AMENDED COUNTERCLAIM

On this date came on to be considered a Motion for Leave to File Fourth Amended Answer, Affirmative Defenses, and to Refile Second Amended Counterclaim by Defendant Wayne A. Lundquist, Jr. ("Lundquist") filed November 27, 1995.

The deadline for amendment of the pleadings on the scheduling order was set for July 21, 1995. Defendant has not shown this Court "good cause" for modifying the scheduling order's deadline for amendment of the

pleadings. See, Fed.R.Civ.P. 16(b); Spiller v. Ella Smithers Geriatric Ctr, 919 F.2d 339, 343 (5th Cir. 1990). Defendant has further failed to comply with the Court's order of November 20, 1995.

For the forgoing reasons, the Court DENIES Defendant's Motion.

SIGNED and ENTERED on this the 4th day of December 1995.

/s/ Janis Graham Jack
JANIS GRAHAM JACK
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

PREMIER FINANCIAL SERVICES - TEXAS, L.P., Plaintiff	§	
	§	C.A. No. C-94-545
VS.	§	
WAYNE A. LUNDQUIST, JR. and JAMES E. GUNN, Defendants.	§	

ORDER

On February 14, 1995, Plaintiff Premier Financial Services Texas, L.P. ("Premier") moved to dismiss Defendant Wayne A. Lundquist Jr.'s ("Lundquist") counterclaim and affirmative defenses in his original answer.

On April 21, 1995, the Court granted Defendant Wayne Lundquist Jr.'s ("Lundquist") oral motion to withdraw all of his counterclaims against Plaintiff Premier. The Court also ordered Defendant Lundquist to respond to Plaintiff Premier's motion to strike Defendant's affirmative defenses on or before April 28, 1995.

However, Defendant did not respond to Plaintiff's motion to strike on April 28, but instead requested an extension of two business days to file a brief which this Court granted on May 4, 1995. Rather than filing a response brief as ordered by the Court, on May 4, 1995, Defendant Lundquist moved unopposed for leave to file first amended answer, affirmative defenses, and counterclaim ("first amended answer") with a certificate of conference dated May 4, 1995. In this motion, Defendant indicated that he intended to withdraw his counterclaims of breach of contract and wrongful foreclosure. Defendant also indicated that he intended to omit the affirmative defenses of failure of consideration, estoppel, and laches.

On May 5, 1995, Plaintiff Premier moved unopposed for leave to file second amended complaint ("second amended complaint") in order to add a party defendant, James E. Gunn ("Gunn"). The certificate of conference is dated May 4, 1995.

On June 14, 1995, this Court granted Premier's motion for leave to file second amended complaint which only added an additional defendant, and granted Defendant's motion for leave to file first amended answer.

On September 20, 1995, Plaintiff Premier moved for summary judgment on its entire claim against Defendant Lundquist and on Defendant Lundquist's counterclaim against Premier for usury.

On September 21, 1995, Defendant Lundquist filed, without moving for leave, a second amended answer and affirmative defenses ("second amended answer"). The deadline for amendment of the pleadings was July 21, 1995. Defendant Lundquist filed the second amended answer in an apparent attempt to circumvent the scheduling order, and add additional defenses and counterclaims.

On October 4, 1995, Premier moved to strike the second amended answer. On November 2, 1995, this Court held a hearing on Plaintiff's motion to strike Defendant's second amended answer. The Court hereby GRANTS Plaintiff's motion to strike Defendant's second amended answer for the reason that Defendant failed to move for leave to amend or to show good cause for modifying the amendment of pleadings deadline in the scheduling order.

On November 3, 1995, Defendant filed a third amended answer and affirmative defenses, and second amended counterclaim ("third amended answer"), without leave to amend, and which did not comply with the Court's oral ruling on November 2, 1995. On November 9, 1995, Plaintiff moved to strike Defendant's third amended answer. At a hearing on November 20, 1995, and in an order signed on that date, the Court GRANTED Plaintiff's motion to strike third amended answer.

On November 27, 1995, Defendant moved for leave to file a fourth amended answer which contained new affirmative defenses ("fourth amended answer). The fourth amended answer appears to be a refiling of the third amended answer which was struck as it did not comply with the Court's order of November 20, 1995.

On November 29, 1995, Defendant supplemented his motion for leave to file the fourth amended answer by seeking to withdraw the reference to the defense of waiver in the fourth amended answer. However, the fourth amended answer stilled contained affirmative defenses not allowed by this Court pursuant to its ruling on November 2, 1995, and order signed November 20, 1995. In particular, Defendant failed to comply with this ruling and order in that he added the affirmative defenses of satisfaction by performance, material alteration, release of the guaranty, and equitable estoppel. Defendant has repeatedly attempted to add defenses and counterclaims after the deadline for amendment of the pleadings and after direct orders from this Court to plead only certain defenses, and the counterclaim for usury.

The Court DENIES Defendant's motion for leave to amend fourth amended answer for failing to show good cause for modifying the scheduling order's deadline for amendment of the pleadings and for failure to comply with the Court's order of November 20, 1995.

SIGNED this the 4th day of December 1995.

/s/ Janis Graham Jack
JANIS GRAHAM JACK
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

PREMIER FINANCIAL SERVICES - TEXAS, L.P., Plaintiff	§	
	§	C.A. No. C-94-545
VS.	§	
WAYNE A. LUNDQUIST, JR. and JAMES E. GUNN, Defendants.	§	

ORDER DENYING DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

On this day came on to be considered Defendant Wayne A. Lundquist, Jr.'s ("Lundquist") Motion for Partial Summary Judgment on his affirmative defense of discharge and on his counter claim of usury against Plaintiff Premiere Financial Services-Texas, L.P. ("Premiere"). For the reasons hereinafter discussed, the Court DENIES the Partial Motion for Summary Judgment urged by the Defendant.

I. JURISDICTION

This Court has jurisdiction on the basis of the diversity of citizenship of the parties, pursuant to 28 U.S.C. § 1332.

II. FACTS AND PROCEEDINGS

On October 24, 1983, Nueces Development Company ("Debtor") executed and delivered to Victoria Savings Association a Promissory Note ("Note") whereby Nueces Development Company promised to pay unto the order of Victoria Savings Association the principal sum of $793,000.00, together with interest thereon on or before the expiration of 365 days from the date of the execution of the Note. The Note was subsequently extended and renewed by various extension and renewal agreements dated November 21, 1984, July 24, 1984, July 22, 1986, and March 30, 1987. Pursuant to the terms of the last extension and renewal agreement, the Note matured on September 19, 1987.

Also on October 24, 1983, Nueces Development Company executed and delivered a Deed of Trust Security Agreement Financing Statement, conveying to the Trustee for the benefit of Victoria Savings Association, and its successors and assigns, certain property (hereinafter "property") as security for the debt owed on the Note. Further, on that same date, Defendant Lundquist, along with others, by and through a Guaranty Agreement, individually guaranteed in writing the payment of the indebtedness evidenced by the note.

The Resolution Trust Corporation (RTC) was appointed conservator of Victoria Savings Association on June 29, 1989. On December 11, 1990, in its capacity as

conservator of Victoria Savings Association, the RTC made demand upon Nueces Development Company and Defendant Lundquist for payment of the Note. Both Nueces Development Company and Lundquist failed to meet such demand. As a result, the RTC proceeded with the foreclosure sale of the secured property pursuant to the terms of the Deed of Trust. The property sold at public auction for the sum of $161,028. After the application of the sale price to the unpaid balance on the Note, a balance of $606,345.08 remained due and owing on the Note, including principle, interest, and attorney's fees.

On January 14, 1994, the RTC as receiver for Victoria Savings Association, F.S.A., transferred the subject Note and Guaranty, along with all right, title and interest therein to Plaintiff Premier Financial Services-Texas, L.P. On December 16, 1994, Premier brought this cause of action to recover the amount owed and due plus interest against Defendant Lundquist based upon his guarantee of the note.

Lundquist filed the motion presently before the Court on June 16, 1995, to which Premiere responded on July 6, 1995. Lundquist alleges that Premiere is precluded from enforcing Lundquist's guaranty on anything other than the original note. Lundquist argues that the guaranty was not a continuing guaranty, nor did he assume liability for any modifications or extensions of

the original note made by the lender and related or unrelated third parties. Therefore, because the Note was extended and renewed, Lundquist contends that he is relieved of liability under the Guaranty Agreement. Lundquist further alleges that the Guaranty Agreement is usurious on its face, and, therefore, may not be enforced. Based on the alleged usurious nature of the Guaranty Agreement, Lundquist moves the Court for an affirmative recovery from Premiere.

Premiere contends that the arguments supporting Lundquist's Motion for Summary Judgment depend on an improper and strained construction of the Guaranty Agreement, and that, as such, the Motion should be denied.

III. DISCUSSION

A. Summary Judgment Standard

Summary judgment is proper, pursuant to FED. R. CIV. P. 56(c), when "the pleadings, depositions, answers to interrogatories, and admissions file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." A party seeking summary judgment bears the initial burden of informing the Court of the basis for its motion and of identifying those portions of the record and affidavits which evidence an absence of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986). Once the movant has met its

burden, it is then incumbent upon the non-movant to show that disputed issues of fact remain. State Farm Life Ins. Co. v. Gutterman, 896 F.2d 116, 118 (5th Cir. 1990). The Court, in turn, must view all inferences from the evidence in the light most favorable to the non-movant. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986).

The movant's summary judgment evidence must sufficiently indicate the failure of an essential element of the non-movant's claim. Celotex Corp., 477 U.S. at 322. A complete failure of proof on an essential element renders all other facts immaterial because there is no longer a genuine issue of material fact. Id. at 323. Rule 56(c) requires the Court to enter summary judgment if the evidence favoring the non-moving party is not sufficient for the jury to enter a verdict in his favor. Anderson, 477 U.S. at 249.

Because the claims on which Lundquist seeks summary judgment are an affirmative defense and a counter claim, respectively, the burden falls on Lundquist to conclusively prove the elements of his contentions in order to prevail on his Motion for Summary Judgment. In regard to Lundquist's discharge defense, he must prove 1) the existence of a material alteration to the original note; 2) a lack of consent on his part to such material alteration; and 3) that harm resulted from such alteration. Sonne v. Federal Deposit

Insurance Corporation, 881 S.W.2d 789, 793 (Tex. Civ. App.--Houston [14th Dist.] 1994, n.w.h.).

In order to prove his usury counter claim, Lundquist must demonstrate 1) that a loan of money occurred; 2) that an absolute obligation to repay the principal exists; and 3) that there exists an exaction from the borrower (or guarantor) of greater compensation than the amount allowed by law. Holley v. Watts, 629 S.W.2d 694, 696 (Tex. 1982).

B. Discharge

Lundquist argues that he has been discharged on his guaranty because the original note was extended and renewed. Lundquist relies on the language in the Guaranty Agreement which provides that Lundquist guaranteed only the payment of "...that *certain promissory note* of even date herewith executed by the Borrowers and payable to the Lender..." in order to establish that he guaranteed only the original note and not any extensions or renewals thereof.

Lundquist contends that the Guaranty Agreement does not require, nor did Lundquist otherwise agree, that he would become liable on any of the future contract agreements between the Lender and third parties, including contracts in the form of renewals or extensions of the original note. Lundquist further asserts that the renewal and extension provisions of the Guaranty Agreement does not waive his discharge defense but

simply allows the Lender to enter into extension and renewal agreements without notice to the Guarantor, and without affecting Lundquist's liability under the original promissory note. The Court disagrees.

It is well settled under Texas law that the guarantor of a note is discharged from his obligation to answer for that debt if the creditor grants an extension of time for the payment of the note to the principal debtor. Federal Deposit Ins. Corp. v. Woolard, 889 F.2d 1477, 1479 (5th Cir. 1989); United States v. Vahlco Corp., 800 F.2d 462, 465 (5th Cir. 1986). There are, however, two exceptions to this general rule. First, a guarantor will not be discharged if his guaranty is a continuing guaranty which encompasses future renewals or extensions. Woolard, 889 F.2d at 1479; Holland v. First Nat. Bank in Dallas, 597 S.W.2d 406, 409 (Tex. Civ. App.--Dallas 1980, writ dism'd). Second, a guarantor may expressly consent to future renewals or extensions and thereby waive any discharge defense. Woolard, 889 F.2d at 1479; Sonne v. Federal Deposit Ins. Corp., 881 S.W.2d 789, 792 (Tex. Civ. App. -- Houston [14th Dist.] 1994, n.w.h.).

With respect to the first exception to the general rule, the language of the Guaranty Agreement expressly limits Lundquist's guaranty to "that certain promissory note". As a result, the guaranty can not qualify as a continuing obligation and the exception does not apply. See Woolard, 889 F.2d at 1479 (holding that language

guaranteeing "that one certain promissory note" did not contemplate a future course of dealing as required by a continuing guaranty). However, the second exception to the general rule is not so easily disposed.

In order to determine whether Lundquist did or did not consent to future extensions and renewals of the Note, it becomes necessary to strictly interpret the language of the Guaranty Agreement along with the language of the Note, and to resolve any ambiguity in favor of Lundquist. See Commons West Office Condos Ltd. v. Resolution Trust Corp., 5 F.3d 125, 127 (5th Cir. 1993) (construing together note and guaranty that were executed contemporaneously as part and parcel of same transaction); Resolution Trust Corp. v. Cramer, 6 F.3d 1102, 1106 (5th Cir. 1993) (interpreting any uncertainty as to meaning of contract of guaranty in favor of guarantor). Because both the Guaranty Agreement and the Note are worded in such a way as to convey a definite legal meaning, the Court finds that it is not ambiguous and will construe it as a matter of law. Coker v. Coker, 650 S.W.2d 391, 393 (Tex. 1983).

The Guaranty Agreement contains the following provision regarding extensions and renewals:

> "Guarantors hereby agree that the Lender may, from time to time without notice to the Guarantors, at its discretion, and with or without valuable consideration, renew, extend or change the time of payment and/or the

manner, place or terms of payment of said promissory note, or any part thereof...; and the exercise by the Lender of any right or power conferred upon it by any agreement with any of the Borrowers or with any of the Guarantors individually, or with any other person or party... *shall in nowise impair or diminish the obligations and liability of the Guarantors hereunder."* Guarantee Agreement, p. 2, ¶ 2 (emphasis added).

The Guaranty Agreement continues as follows:

"...Guarantors hereby...waive notice of and *consent to any act of forbearance by the Lender, any renewal, extensions,* rearrangement or assignment of said promissory note." Guarantee Agreement p 2 fl (emphasis added).

Further, the Promissory Note itself states that

"All.. guarantors...waive...defense on account of the extension of time of payments or change in the method of payments, and *consent to any and all renewals and extensions* in the time of payment hereof..." Promissory Note, p. 2, ¶, 2 (emphasis added).

The language of the Guaranty Agreement and the Note is abundantly clear. The agreement between the lender and the guarantors in this case accounted for any potential extensions and renewals of the Note, and, quite obviously, intended to maintain the validity of the

individual guaranties in spite of such extensions and/or renewals.

Lundquist's argues that while the Guaranty Agreement established that the lender could extend and renew the note without notice to the guarantors, such extension and renewal was not consented to by the guarantors. This argument is without merit. See NCNB Texas Nat. Bank v. Johnson, 11 F.3d 1260, 1266 (5th Cir.) (modification did not affect liability when guarantor expressly waived notice of modifications), reh'g denied 19 F.3d 17 (5th Cir. 1994); Lenamond v. North Shore Supply Co., 667 S.W.2d 283, 286 (Tex. Civ. App.--Houston [14th Dist.] 1984, no writ) (waiver of notice of alteration resulted in implied consent to alteration). Furthermore, Lundquist has offered no explanation for the actual (and fatal) consent language contained in the Guaranty Agreement and in the Promissory Note.

Consent is determined on an individual basis according to the particular language of the guaranty. Federal Deposit Ins. Corp. v. Attayi, 745 S.W.2d 939, 944 (Tex. Civ. App.--Houston [14th Dist.] 1988, no writ). In the present case, by signing the Guaranty Agreement, Lundquist expressly agreed to incur liability for extensions and renewal of the original Promissory Note. Lundquist has failed to offer any competent summary judgment evidence suggesting a lack of consent on his part of any material alteration of the original note. As

such, Lundquist's Motion for Summary Judgment on his affirmative defense of discharge fails as a matter of law.

C. Usury

To support his counter claim of usury, Lundquist directs the Court's attention to language in the Guaranty Agreement providing that if the

> "...[b]orrowers are not liable, *for any reason,* for the amounts due or which may become due under the said promissory note...such facts shall in no manner affect the liability of the Guarantors hereunder, but the *Guarantors shall be and remain liable herein notwithstanding said Borrowers be not liable for such indebtedness,* and to the same extent as the Guarantors would have been liable if the indebtedness of said Borrower has been enforceable against them." Guaranty Agreement, p. 2, ¶ 4. (emphasis added by Lundquist).

Lundquist claims that the Guaranty Agreement is usurious because, as written, it provides for Lundquist's liability even if the Borrower has satisfied his obligations under the note. Such an interpretation of the Guaranty Agreement is unconvincing at best.

There is no evidence that, under the Guaranty Agreement, the guarantors would remain liable if the Note was paid in full by the Borrower. As Premiere correctly notes, the use of the words "amount due" and "indebtedness" in the above cited guaranty provisions

clearly indicate that the parties did not intend for the guarantors' liability to continue should the Note be paid.

Lundquist has offered the Court no credible evidence establishing that the Guaranty Agreement is usurious. Accordingly, his Motion for Summary Judgment on his counter claim of usury must fail as a matter of law.

IV. CONCLUSION

For the foregoing reasons, the Court is convinced that Defendant Wayne A. Lundquist, Jr. has failed to show an absence of a genuine issue of material fact in his affirmative defense of discharge and his counter claim of usury against Plaintiff Premiere Financial Services-Texas, L.L.P. Accordingly, Defendant's Motion for Partial Summary Judgment is hereby and in all things DENIED.

SIGNED AND ENTERED this the 24th day of July, 1995.

/s/ Janis Graham Jack
JANIS GRAHAM JACK
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

PREMIER FINANCIAL SERVICES - TEXAS, L.P., Plaintiff	§	
	§	C.A. No. C-94-545
VS.	§	
WAYNE A. LUNDQUIST, JR. and JAMES E. GUNN, Defendants.	§	

ORDER DENYING PLAINTIFF'S MOTION TO DISMISS DEFENDANT'S COUNTERCLAIM AND TO STRIKE AFFIRMATIVE DEFENSES

On this day came to be considered Plaintiff's motion (1) to dismiss Defendant Wayne A. Lundquist, Jr.'s ("Lundquist') Counterclaim, as set forth in the First Amended Answer, Affirmative Defenses, and Counterclaim and (2) to strike certain affirmative defenses alleged by Defendant Lundquist in his First Amended Answer as insufficient defenses. The Court, after consideration of Plaintiff's motions and pleadings on file, is of the opinion that both of Plaintiff's motions should be denied.

Accordingly, it is ORDERED that Plaintiff's Motion to Dismiss Defendant's Counterclaim and to Strike Affirmative Defenses is hereby and in all other things DENIED.

SIGNED AND ENTERED on this the 28th day of August, 1995.

/s/ Janis Graham Jack
JANIS GRAHAM JACK
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

PREMIER FINANCIAL SERVICES - TEXAS, L.P., Plaintiff	§	
	§	C.A. No. C-94-545
VS.	§	
WAYNE A. LUNDQUIST, JR. and JAMES E. GUNN, Defendants.	§	

ORDER

On September 20, 1995, Plaintiff Premier Financial Services, Texas, L.P., ("Premier") moved for summary judgment on its entire claim against Defendant Wayne A. Lundquist ("Lundquist") and on Lundquist's counterclaim against Premier for usury. Plaintiff's motion for summary judgment was written in response to Defendant's first amended answer, affirmative defenses, and counterclaim ("first amended answer"). On September 21, 1995, without leave of Court or Plaintiff's consent, Defendant filed a response to Plaintiff's second amended complaint, second amended answer, and affirmative defenses ("second amended answer"). The deadline for amendment of the pleadings was July 21,

1995. On October 4, 1995, Premier moved to strike the second amended answer.

On November 2, 1995, this Court held a hearing on Plaintiff's motion to strike Defendant's second amended answer and motion for summary judgment. At this hearing, the Court allowed Lundquist to file a supplemental amended answer on November 3, 1995, limiting his affirmative defenses to the following: (1) promissory estoppel; (2) laches; (3) usury; and (4) that the guaranty is not enforceable by its own terms. The Court also allowed Lundquist to file a counterclaim for usury. In addition, the Court ordered that Plaintiff shall be allowed to supplement its motion for summary judgment to address these affirmative defenses and this counter claim.

SIGNED AND ENTERED on this the 20th day of November, 1995.

/s/ Janis Graham Jack
JANIS GRAHAM JACK
UNITED STATES DISTRICT JUDGE

Supreme Court, U.S.
FILED
APR 16 1997
OFFICE OF THE CLERK

DOCKET No. 96-1456

IN THE
SUPREME COURT OF THE UNITED STATES
1996 TERM

WAYNE A. LUNDQUIST, JR., PETITIONER

-VS-

PREMIER FINANCIAL SERVICES-TEXAS, L.P.,
RESPONDENT

BRIEF IN OPPOSITION

TO

PETITION FOR A WRIT OF CERTIORARI

MICHAEL G. COLVARD
Texas Bar No. 04629200
MARTIN, DROUGHT & TORRES
NationsBank Plaza, 25th Floor
300 Convent Street
San Antonio, Texas 78205
Telephone: (210) 227-7591
Facsimile: (210)227-7925
ATTORNEY IN CHARGE FOR
RESPONDENT

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ATTORNEY IN CHARGE FOR RESPONDENT

QUESTIONS PRESENTED

Whether Petitioner was denied due process of law as a result of:

(a) the District Court granting leave to amend pleadings such that a "live" pleading existed by which defense of a motion for summary judgment could be supported; and

(b) thereafter, striking the entire pleading, including the authorized and allegedly, unauthorized amended pleadings of the affirmative defenses of waiver and equitable estoppel, as a result of the Honorable District Court's mistake that the Honorable District Court had not authorized the pleading of "waiver"; and

(c) thereafter, entering a summary judgment as a result of the "*death penalties*" order striking the pleadings which otherwise (that is, with the Amended Pleadings) was not appropriate as a matter of law.

Whether the District Court erred in granting summary judgment against Lundquist's where the record is replete with summary judgment evidence illustrating material fact issues

RECORD EXCERPT DEFINITIONS

"Tr" refers to the page number in the Record.

"ARE" refers to the tab number of the Appellant's Record Excerpts

"RE" refers to the tab numbers of the Appellee's Record Excerpts.

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STATEMENT OF THE CASE

A. Statement of Facts

On or about October 24, 1983, Nueces Development Company executed and delivered to Victoria Savings Association, F.S. A. a promissory note ("Note") in which it promised to pay to the order of Victoria Savings Association, F.S.A., the principal sum of $ 793,000.00 together with interest thereon on or before the expiration of 365 days from the date of the execution of the Note. [Tr. 909]. The Note was subsequently renewed and extended by various extension and renewal agreements dated November 21, 1984, July 24, 1985, July 22, 1986, and March 30, 1987. [Tr. 947-970]. Pursuant to the terms of the last extension and renewal agreement, the Note matured on September 19, 1987. [Tr. 964].

On October 24, 1983, Nueces Development Company executed and delivered a Deed of Trust Security Agreement-Financing Statement conveying to the Trustee for the benefit

of Victoria Savings Association, F.S.A. and its successors and assigns certain property as security for the debt owed on the Note. [Tr.935-946]. Further, on that same date, Wayne A. Lundquist, Jr. ("Lunquist'"), along with others by and through a Guaranty Agreement ("Guaranty"), individually guaranteed in writing the payment of the indebtedness evidenced by the Note. [Tr. 914-834; ARE 16}

The Resolution Trust Corporation ("RTC") was appointed conservator of Victoria Savings Association, F.S.A. on June 29, 1989. [Tr. 907]. On December 11, 1990, in its capacity as conservator of Victoria Savings Association, F.S.A., the RTC made demand upon Nueces Development Company and Lunquist for the payment of the Note. [Tr. 1553]. Both Nueces Development Company and Lunquist failed to meet such demand. [Tr. 1043: 1489]. As a result, the RTC proceeded with the foreclosure sale of the secured property pursuant to the terms of the Deed of Trust. [Tr. 971-

977]. The property sold at public auction for the sum of $161,028.00 [Tr. 509]. After the application of the sale price to the unpaid balance on the Note, a balance of $606,345.08 remained dued and owing on the Note, including principal interest and attorney's fees. [Tr. 907-908]. On October 25, 1991, Victoria Savings Association, F.S.A. failed, and the RTC as conservator for Victoria Savings Association, F.S.A. was replaced with the RTC as receiver for Victoria Savings Association, F.S.A. [Tr. 486]. On December 30, 1993, the RTC as receiver for Victoria Savings Association, F.S.A assigned the Note and Guaranty along with all right, title and interest therein to Premier Financial Services-Texas, L.P. ("Premier"). [Tr.908]

B. Course of Proceedings and Disposition in Court Below

On December 16, 1994, Premier filed suit against Lundquist based on his Guaranty of the Note [Tr. 1627]. On

June 16, 1995, Lundquist moved for summary judgment on his usury allegations. [Tr. 1135] On July 24, 1995, the district court denied Lundquist's motion. [Tr. 1031]. On September 20,1995, Premier moved for summary judgment on its entire claim against Lundquist. [Tr. 900]. On October 13, 1995, Premier supplemented its motion for summary judgment with a reply to Lundquist's response to Premier's motion for summary judgment. [Tr. 761]

At the time of the filing of Premier's motion for summary judgment, Lundquist's first amended answer and counterclaim was the only pleading before the court. [Tr. 989; 1164;1215;1415;1426]. In this answer, Lundquist raised the following affirmative defenses to Premier's cause of action: (1) the Texas four year estatute of limitations or in the alternative the doctrine of laches barred Premier's suit; (2) wrongful foreclosure; and (3) usury. [Tr. 1418]. In his counterclaim, Lundquist asserted that the Guaranty was

usurious on its face. [Tr. 1418]. On December 4, 1995, the district court granted Premier's Motion for Summary Judment. [Tr. 518].

SUMMARY OF THE ARGUMENT

This Honorable Court should deny Lundquist's petition for writ of certiorari because Lundquist was not denied due process of law and is liable on his Guaranty. The trial court, in its discretion, struck three of Lundquist's amended answers and counterclaims due to Lundquist's failure to meet pleading deadlines, failure to obtain leave, failure to adhere to the court's leave when the same was granted, and repeated attempts to assert affirmative defenses and counterclaims which he had abandoned by pleading amendment or motion to withdraw. The pleadings were struck only after Lundquist was given ample opportunities to cure the defects in the amendments. The trial court did not

abuse its discretion in striking the amended pleadings filed by Lundquist or deny him due process of law.

In addition, even if such stricken pleadings were permitted to be filed and considered, the petition should be denied because Lundquist's affirmative defenses are barred as a matter of law. *See*, Halbert v. City of Sherman, Tex., 33 F.3d. 526 (5th Cir. 1994) (Even though denial of leave to amend was error, case would not be remanded due to waste of judicial resources since appellant's claims fail as a matter of law). The Fifth Circuit Court of Appeals correctly affirmed the judgment of the district court that Lundquist is liable on his Guaranty. Each of Lundquist's arguments is contrary to the express terms of the Guaranty and well-settled case law. Lundquist relies on an improper construction of the Guaranty for his assertions that he is not liable for future extensions and renewals of the Note and for his affirmative defense and counterclaim of usury. The Guaranty and the Note specifically

address extensions and renewals and Lundquist expressly consented in advance to the same. Lundquist argues that the Guaranty could be construed to hold him liable if the Note was fully paid and thus is usurious on its face. However, the Guaranty does not evidence any such intention and the Note, which is incorporated into the Guaranty, contains a usury savings clause. The express language of the Guaranty waives each of Lundquist's live and/or stricken affirmative defenses of waiver, laches, estoppel and wrongful foreclosure.

ARGUMENT

A. Lundquist was not denied due process of law.

Lundquist argues that he was denied due process of law because the District Court struck all of his amended pleadings responsive to Premier's second amended complaint even though the court had already entered an order permitting Lundquist to amend his answer. Lundquist, however, was not denied due process, but on the contrary, was given ample

opportunities to comply with the order permitting the amendment but, instead, failed to comply with procedure and abused his privilege.

The Federal Rules of Civil Procedure provide that, after an answer has been filed, a party may amend the party's pleading "only by leave of court." *Fed.R.Civ.P. 15(a)* Moreover, although Rule 15(a), Fed.R.Civ.P. also provides that leave to amend shall be freely given when justice so requires, "**leave to amend is by no means automatic**." Halbert v. City of Sherman, Tex., 33 F.3d. 526, 529 (5th Cir. 1994) (emphasis added).

Lundquist attempted to file a second amended answer and counterclaims two months after the pleading deadline of July 21, 1995 and without a motion for leave of court to amend. [Tr. 1455; 1446; 882] Although Lundquist's second amended answer was properly struck by the District Court for failure to request leave and show good cause therefor,

Lundquist was granted leave to file a third amended answer asserting only certain defenses, for which he did not comply. Lundquist repeatedly failed to comply with the order granting leave and twice filed amended answers exceeding the scope of the order.

Lundquist was given due process of law; he simply did not like the results. Lundquist had fair notice of the pleading deadlines and knew the consequences of failing to comply with same. The consequences of the struck pleadings are a result of Lundquist's bad faith actions and not a denial of due process. Lundquist was denied leave to amend his fourth amended answer and his pleadings were struck only after he failed to comply with procedure and was subsequently given several chances by the District Court to amend his pleadings to conform with court orders and failed. Lundquist had his opportunity to be heard and abused it.

The cases cited by Lundquist do not support his position that he was denied due process. The cases merely set forth the general requirement of due process which is the *opportunity to be heard*. Lundquist, however, was not denied an opportunity to be heard. A review of the pleading history of this case reveals that the district court gave Lundquist several opportunities to be heard.

On December 16, 1994, Premier sued Lundquist. [Tr. 1627]. On January 27, 1995, Lundquist filed an Answer. [Tr. 1575]. On April 20, 1995, the court granted Lundquist's oral motion to withdraw his counterclaims against Premier. [Tr. 1456-1457]. The court also ordered Lundquist to respond to Premier's Motion to Strike Defendant's Affirmative Defenses on or about April 28, 1995 and set a pleading amendment deadline of July 21, 1995. [Tr. 1455;1446]

Lundquist did not respond to Premier's motion to strike on April 28, 1995 as ordered by the court. [Docket

Sheet, p.6], but instead requested an extension of two business days to file a brief which the trial court granted on May 4, 1995. [Tr. 1436; 1438]. Rather than file a responsive brief as requested and as ordered by the court, on May 4, 1995, Lundquist's moved for leave to file a First Amended Answer, Affirmative Defenses and Counterclaim. [Tr. 1426]. In this motion, Lundquist indicated that he intended to withdraw his counterclaims for breach of contract and wrongful foreclosure. [Tr. 1426]. Lundquist also indicated that he intended to omit the affirmative defenses of failure of consideration, estoppel and laches. [Tr. 1426]. Lundquist's First Amended Answer, Affirmative Defenses and Counterclaim asserted 1) statute of limitations; 2) improper foreclosure; 3) discharge; and 4) usury. Lundquist abandoned the affirmative defenses asserted in his original answer of 1) failure of consideration; 2) estoppel; 3) interference with collateral; 4) ambiguous and unenforceable guaranty; and 5) impossibility of performance

Lundquist also appeared to abandon his counterclaims for breach of contract, mental anguish and wrongful foreclosure. [Tr. 1426].

On May 5, 1995, Premier moved for leave to file a second amended complaint in order to add a party defendant. [Tr. 1327]. On June 14, 1995, the trial court granted Premier's motion for leave to file a second amended complaint (which only added one additional defendant), and granted Lundquist's motion for leave to file his first amended answer. [Tr. 1164-1166].

On June 16, 1995, Lundquist moved for summary judgment on his usury allegations. [Tr. 1135].

The deadline for filing amended pleadings passed on July 21, 1995. [Tr. 1454]

On July 24, 1995, the district court denied Lundquist's motion for summary judgment [Tr. 1031].

On September 20, 1995, Premier moved for summary judgment on its entire claim against Lundquist and on Lundquist's counterclaim against Premier for usury. [Tr. 900]

On September 21, 1995, without moving for leave or obtaining Premier's written consent, Lundquist filed a Second Amended Complaint and Amended Answer and Affirmative Defenses. [Tr. 882]. In this answer, Lundquist asserted affirmative defenses of 1) release; 2) breach of contract; 3) estoppel; 4) waiver; 5) laches; 6) failure of consideration; and 7) wrongful foreclosure. However, release, estoppel, breach of contract, waiver and failure of consideration were dropped as defenses when Defendant filed his First Amended Answer, Affirmative Defenses and Counterclaim.

On October 4, 1995, Premier moved to strike the Second Amended Answer.[Tr. 995]. On November 2, 1995, the district court held a hearing on Premier's motion, and thereafter, granted Premier's motion to strike Lundquist's

Second Amended Answer because Lundquist's failed to move for leave to amend or to show good cause for modifying the amendment of pleadings deadline and the scheduling order. Moreover, the trial court ordered Lundquist to file an amended answer asserting only the defenses of 1) promissory estoppel; 2) laches; 3) usury; and 4) that the Guaranty is not enforceable by its own terms.[Tr. 69; 539; 612]

On November 3, 1995, without moving for leave to exceed the court's leave to amend or obtaining Premier's written consent, Lundquist filed a Third Amended Answer and Affirmative Defenses and a Second Amended Counterclaim which asserted the defenses of 1) satisfaction by performance of the Guaranty; 2) waiver; 3) equitable and promissory estoppel; 4) laches; 5) setoff and offset; 6) alteration of indebtedness, and which included a counterclaim for usury. This answer asserted defenses beyond the district court's leave

as announced in its oral ruling on November 2, 1995. [Tr. 639].

On November 9, 1995, Premier moved to strike Lundquist's Third Amended Answer. [Tr. 628]

On November 20, 1995, the trial court granted Premier's motion to strike the Third Amended Answer. (Tr. 610)

On November 27, 1995, without Premier's written consent, Lundquist moved for leave to file an Fourth Amended Answer which contained new affirmative defenses. [Tr. 554]

On November 29, 1995, Lundquist supplemented his motion for leave to file the Fourth Amended Answer by seeking to withdraw reference to the defense of waiver in the fourth amended answer.[Tr. 550]. However, the fourth amended answer still contained affirmative defenses not allowed by the district court pursuant to its ruling on

November 2, 1995 [Tr. 554] and its order signed November 20, 1995. [Tr.610]. In particular, Lundquist failed to comply with these rulings by adding affirmative defenses of satisfaction by performance, material alteration, release of the Guaranty, and equitable estoppel., [Tr. 554]

On December 4, 1995, the district court denied leave for Lundquist to file his Fourth Amended Answer and granted Premier's motion for summary judgment. [Tr.542;610].

All of the foregoing crearly evidences Lundquist's access to due process of law.

B. The Trial Court did not Abuse its Discretion in Denying Leave to File and in Striking Lundquist's Unauthorized Amended Answers and Counterclaims.

Lundquist does not assign error to the district court's actions relating to this Fourth Amended Answer. Lndquist complains, however, that the court's actions in denying leave

to file his second and third amended answer and in striking these pleadings was erroneous and a denial of due process.

In reviewing whether a district court erred in refusing to permit the amendments of pleadings, an appellate court may reverse only upon a finding of an abuse of discretion. *Foman v. Davis*, 371 U.S. 178, 182 (1962); *Halbert*, 33 F. 3d at 529; *Addinton v. Farmer's Elevator Mutual Ins.. Co.*, 650 F. 2d 663, 666 (5th Cir. 1981). A district court has some discretion to allow a late amendment when nc prejudice would result to the other party and the ends of justice so require. *Banc One Capital Partners Corp.v. Kneipper*, 67 F. 3d 1187, 1199(5th Cir. 1995).

Although FED. R.CIV. P. 15(a) evidences a bias in favor of granting leave to amend when justice requires, a decision to grant leave is not automatic and is within the discretion of the court. *Halbert*, 33 F. 3d at 529. In exercising its discretion, a court may consider such factors as "undue

delay, bad faith or dilatory motive" on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, and futility of the amendment. *Foman*, 371 U.S. 178; *State of Louisiana v. Litton Mortgage Co.*,50 F. 3d 1298, 1302 (5th Cir. 1995), citing *Whittaker v. City of Houston*, 963 F. 2d 831, 836 (5th Cir.1988).

In the present case, it is clear that undue delay, bad faith and dilatory motive each bore a role in the district court's denials of leave and of the striking of the various answers. Throughout Volume 10 of the Record, the district court's frustration is evident:

"...[a]and I told you how to file, Mr. Jordon, and you didn't do it, and you may not bring up these new matter after the pleading deadline, so now you don't have an answer. You want to file one and ask leave of court. I'll think about it then...

"...actually, whether he pleads it or not I have granted him the right to do I think four defenses and a counterclaim...

"I've granted him the right to assert those defenses and told him to plead them by a certain day. He didn't do it, he wanted to add some more fraud, some more accidents and mistakes, which was not pled certainly before the deadline and is not going to be plead now...

"Well, I really, Mr. Jordon, the Court, this is trying the patience of the Court. We have these hearings and you tell me what your defenses are and your counterclaim and I said all we need to do is see them up in writing, and I grant you leave to do it well after the deadline passed, mind you. I grant you leave to do it and we still end up with new elements thrown in here, and I am going to keep striking them until you make a good faith attempt to comply with the Court's order." [Tr.96, p.10-12]

The district court in the present case ruled in the same manner affirmed by this court in *State of Louisiana v. Litton Mortgage Company*, 50 F. 3d 1298. By asserting, abandoning and attempting to reassert the same defenses previously withdrawn, and by exceeding the leave granted by the district court, Lundquist's actions in this case indicated "bad faith and a dilatory motive at worst and weak attempts at artful pleading. *Id.* at 1304.

Moreover, the District Court acted in accordance with this Supreme Court's holding in *Foman* that a court may deny leave to amend where there is undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, and futility of the amendment. *Foman*, 371 U.S. 178. Lundquist acted in bad faith and repeatedly failed to cure his amended pleadings.

Lundquist has failed to demonstrate that the trial court abused its discretion or denied Lundquist due process of law by denying any motion for leave to file an amended answer or in striking the second, third and fourth amended answers. Prejudice would result to Premier as a result of his late amendments. The issues had already been narrowed once by pleading amendment. The pleading amendment deadline had passed. The district court had disposed of Lundquist's usury defenses and counterclaim by summary judgment. Premier had filed its Motion for Summary Judgment. The interests of justice did not require that Lundquist's amendments be allowed. *Bank One Capital partners Corp v. Kneipper*, 67 F. 3d 1187 (5th Cir. 1995); *Pope v. MCI Telecommunications Corp.*, 937 *F. 2d 258 (5th Cir. 1991), cert.denied,504 U.S. 916.*

Lundquist attempts to cast blame upon Premier for his pleading failures due to Premier's alleged lateness in filing

disclosures required pursuant to Fed. R. Civ. P. 26. However, Lundquist himself failed to timely file Rule 26 disclosures and cannot now complain of Premier's action in this regard. [Tr. 516]. Moreover, the very defense which Lundquist so strenuously argues should have been considered was not something that Premier's disclosures would have revealed. Specifically, Lundquist's second , third and fourth amended answers center in large part on the alleged parol agreement Victoria Savings Association, F.S.A. that the Guaranty would be released within a year. This alleged oral agreement contradicts premier's records and only Lundquist himself would have any knowledge of this alleged conversation.

C. Summary Judgment was Proper because Lundquist's Defenses of Laches, Promissory Estoppel, and Equitable Estoppel are Barred as a Matter of Law

1. Laches and Equitable Estoppel

Lundquist asserts that Premier's cause of action on the guaranty is barred by the doctrine of laches. Lundquist

intertwines his laches defense with his unpled and abandoned affirmative defenses of promissory estoppel and equitable estoppel. Lundquist bases these defenses on three premises. Lundquist asserts that 1) Premier failed to bring suit for almost eleven (11) years; 2) the RTC failed to deny "the notice by Lundquist in 1989 of his non-liability; and 3) Lundquist and a representative at Victoria Savings Association, F.S.A., entered into an alleged oral agreement consistent with his interpretation of the Guaranty that Lundquist would not be liable for renewals and extensions of the Note. Lundquist, however, has failed to raise a genuine issue of material fact as to these issues. In addition to his pleading omissions, the language of the Guaranty, the common law pertaining to laches, the parol evidence rule and the hearsay rule each preclude Lundquist's defenses.

Lundquist again ignores the terms of the Guaranty as they relate to his laches defense:

"Guarantors hereby agree that the Lender may, from time to time, without notice to the Guarantors at its discretion, and with or without valuable consideration, renew, extend, or change the time of payment and/or the manner, place or terms of payment of said promissory note, or any part thereof, allow substitution or withdrawal of any collateral, or may release any security held in connection with the promissory note or any person or party liable thereon; and *the exercise of the Lender of any right or power conferred upon it by any agreement with any of the Borrowers or with any of the Guarantors individually or with any other person or party shall be wholly discretionary with the Lender, in such exercise of, or failure to exercise, such right or power*

shall in no way impair or diminish the obligation and liability of the Guarantors hereunder..."

"The Lender, its succesor and assigns, shall not be liable for failure to use diligence in collection of any amounts due or which may become due under the terms of said promissory note hereby guaranteed, or pursuing the liability of any person under said promissory note or this guaranty; and the Guarantors hereby expressly waive notice to the Guarantors of acceptance of this guaranty, presentment for payments, notice of dishonor, notice of protest, and notice of said promissory note, *diligence in bringing suit against any person, natural of artificial, liable on said promissory note or this guaranty and*

waive notice of or consent to any act of forbearance by the [Lender], any renewal extensions rearrangement or assignment of said promissory note." *(Emphasis added.) [Tr. 1075]*

Thus, even if Lundquist had a valid defense of laches, he has waived such a defense based on any action or inaction of the lender and its assignee Premier. [Tr. 1074-1077].

Lundquist's laches defense is inextricably tied to his untenable position that the Guaranty did not apply to extensions and renewals, and thus ignores the effect on the timing of filing suit. Pursuant to the extension and renewal agreements, the maturity date of the loan was extended to September 19, 1987 [Tr. 964]. Victoria Savings Association, F.S.A. went into receivership under the Resolution Trust Corporation ("RTC") on June 29, 1989. [Tr. 509]. Premier is a successor and assign of the RTC. [Tr. 163]. As a matter

of law, Premier, as a successor in interest to the RTC, had six years from that date to bring suit on the Note and Guaranty. *Jackson v. Thrweatt*, 883 S.W. 2d 171 (Tex. 1994). Lundquist does not assign error to the district court's ruling on the statute of limitations.

Laches is an equitable defense and may not be used against the enforcement of a purely legal right. *Federal Deposit Ins.. Corp. v. Fuller*, 994 F. 2d 223, 224 (5th Cir. 1993); *Dillard v. Broyles*, 633 S.W. 2d 636, 645 (Tex. App.-- Corpus Christi 1982, writ ref'd n.r.e.), *cert. denied*, 463 U.S. 1208 (1983). In addition, laches does not apply to a cause of action, whether legal or equitable, that comes within a specific provision of the statute of limitations absent extraordinary circumstances. *Clark v. Amoco Production Co.*, 794 F. 2d 967, 971 (5th Cir. 1986); *Dillard*, 633 S.W. 2d at 645. In the present case, Premier sued Lundquist for breach of a guaranty (a legal cause of action) within the time frame imposed by

specific limitations provisions. As such, Lundquist's attempt to claim laches fails as a matter of law.

Lundquist disputes that laches is available only when an action does not come within the provisions of a particular statue of limitations. Lundquist furthermore states that laches occurs when there is an unreasonably long delay in asserting legal or equitable rights and the defendant has in good faith made change of position to his detriment because of the delay. Lundquist failed to demonstrate any "good faith change of position to this detriment" because of the alleged delay. A mere self-serving letter that one is not liable is hardly such a good faith change of position. *Bluebonnet Sav. Bank v. Grayridge Apt. Homes, Inc.* 907 S.W. 2d 904, 912 (Tex. App.--Houston [1st Dist] 1995, no writ). Moreover, based on the extensions of the Note, there was no unreasonable delay as matter of law.

To support his laches argument, Lundquist cites the following cases: *Barfield v. Howard M. Smith Company*, 426 S.W. 2d 834, 840 (Tex. 1968); *Helsley v. Anderson*, 519 S.W. 130, 133-134 (Tex. Civ. App. --Dallas 1975, no writ); *Buzbee v. Castlewood Civic Club*, 737 S.W. 2d 366, 369 (Tex. App.--Houston [4th Dist.] 1987, no writ); *Murray v. San Jacinto Agency, Inc.*, 800 S.W. 2d 826, 828 (1990); *City of Forth Worth v. Johnson*, 388 S.W. 2d 400, 403 (1964); *DeBenavides v. Warren*, 674 S.W. 2d 353, 362 (Tex. App.--San Antonio 1984, writ ref'd n.r.e.). However, none of the cases cited by Lundquist pertain to written guaranties and none involve contracts with waiver provisions.

2. Promissory Estoppel

Lundquist asserts that the trial court erred in granting summary judgment in favor of Premier because a fact question exists as to promissory estoppel. Estoppel was not among the defenses before the court because it was not plead in

Lundquist's First Amended Answer. [Tr. 1418] However, even if considered, Lundquist's estoppel defense fails to present a genuine issue of material fact precluding summary judgment in favor or Premier.

(a) The Parol Evidence Rule

Lundquist argues that parol evidence may be admitted to show his allege oral agreement with Sam Beagle, an agent of Victoria Savings Association, F.S.A., that the Guaranty would be released in one year. Lundquist admits that the parol evidence rule may not be used to contradict the terms of a written agreement and that the Guaranty is ambiguous. Lundquist, instead, contends that the Guaranty does not address renewals and his alleged agreement is a collateral agreement naturally not included in the Guaranty itself.

The Guaranty, however, addresses renewals and extensions. Lundquist expressly consented to remain liable for renewals and extensions based on the unambiguous language

of the Guaranty and parol evidence is inadmissible to vary such terms. To reiterate, the Guaranty expressly states: "Guarantors hereby expressly...consent to any act of forbearance by the [Lender], and any renewal, extensions, rearrangement or assignment of said promissory note." [Tr.1075]

Thus, to the extent that the Guaranty itself speaks to the agreement as to whether the Guaranty covered renewals and extensions, any "collateral agreement" which would vary these terms must be excluded. *Town North Nat'l Bank v. Broaddus*, 569 S.W. 2d 489 (Tex. 1978); *Transit Enterprises, Inc.v. Addicks Tire & Supply, Inc.*, 725 S.W. 2d 459, 461 (Tex. App.--Houston [1st Dist.] 1987, no wirt). Because Lundquist's assertion directly contradicts the terms of the Guaranty, it is inadmissible. Moreover, because this issue was addressed, it is not a collateral agreement.

(b) Hearsay

In addition to being inadmissible based on the parol evidence rule, Lundquist's statements regarding representations allegedly made by a Victoria Association, F.S.A representative are hearsay. FED. R. CIV. EVID. 801 (c). Victoria Savings Association, F.S.

A. Is not a party to this lawsuit, and thus, any representations do not constitute admissions by a party opponent. FED. R. CIV. EVID. 801 (d)(2). Moreover, under Texas law, a representation that a guarantor will be liable on a guaranty is inadmissible and inadequate to defeat the plain language of the Guaranty. *E.g Dean v. Allied Oil Co.*, 261 S.W. 2d 900 (Tex. Civ. App.--Waco 1953, writ dism'd).

Prayer

For the foregoing reasons, Respondent respectfully requests that this Honorable Court deny Lundquist's Petition for Writ of Certiorari and affirm the judgment of the District

court. Further, Respondent requests such other and further relief, at law or in equity, to which it may show itself entitled.

Respectfully submitted,

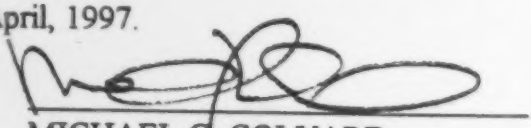
MARTIN, DROUGHT & TORRES, INC.
NationsBank Plaza, 25th Floor
300 Convent Street
San Antonio, TX 78205
Telephone: (210) 227-7591
Facsimile: (210) 227-7924

By: _____
MICHAEL G. COLVARD
Texas State Bar No.04629200
ATTORNEYS FOR RESPONDENT,
PREMIER FINANCIAL SERVICES, - TEXAS, L.P.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief in Opposition to Petition for A Writ of Certiorari has been served by certified mail, return receipt requested, to:

Shelby A. Jordan
Jordan, Shaw & Hyden, P.C.
900 NationsBank Center North
500 Waters Street
Corpus, Christi, Texas 78471
on the 16th day of April, 1997.



MICHAEL G. COLVARD